No. 17-1026	
Title:	Gilberto Garza, Jr., Petitioner v. Idaho
Docketed:	January 24, 2018
Lower Ct:	Supreme Court of Idaho
Case Numbers:	(44991)
Decision Date:	November 6, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jan 23 2018	Petition for a writ of certiorari filed. (Response due February 23, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Feb 21 2018	Waiver of right of respondent State of Idaho to respond filed. **Main Document**
Feb 22 2018	Brief amicus curiae of The Ethics Bureau at Yale filed. **Certificate of Word Count** **Proof of Service** **Main Document**
Feb 22 2018	Brief amicus curiae of Idaho Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 07 2018	DISTRIBUTED for Conference of 3/23/2018.
Mar 08 2018	Response Requested. (Due April 9, 2018)
Mar 16 2018	Motion to extend the time to file a response from April 9, 2018 to June 8, 2018, submitted to The Clerk. **Main Document**
Mar 16 2018	Response to motion to extend the time to file a response from petitioner Gilberto Garza, Jr. filed. **Main Document**
Mar 20 2018	Motion to extend the time to file a response is granted in part, and the time is extended to and including May 15, 2018.

May 08 2018	Brief of respondent State of Idaho in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 21 2018	Reply of petitioner Gilberto Garza, Jr. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 22 2018	DISTRIBUTED for Conference of 6/7/2018.
Jun 11 2018	DISTRIBUTED for Conference of 6/14/2018.
Jun 18 2018	Petition GRANTED.
Jun 21 2018	Motion for an extension of time to file the briefs on the merits filed. **Main Document**
Jul 03 2018	Motion to extend the time to file the briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 10, 2018. The time to file respondent's brief on the merits is extended to and including September 17, 2018.
Jul 17 2018	Motion to dispense with printing the joint appendix filed by petitioner Gilberto Garza, Jr. **Main Document** **Proof of Service**
Aug 10 2018	Brief of petitioner Gilberto Garza, Jr. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 16 2018	Brief amici curiae of Idaho Association of Criminal Defense Lawyers, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 17 2018	Brief amicus curiae of The Ethics Bureau at Yale filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 17 2018	Brief amicus curiae of Cato Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 20 2018	SET FOR ARGUMENT on Tuesday, October 30, 2018
Aug 24 2018	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Sep 10 2018	Record requested from the Supreme Court of Idaho.
Sep 12 2018	CIRCULATED

Sep 17 2018	Brief of respondent State of Idaho filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 24 2018	Brief amicus curiae of United States filed. (Distributed) **Proof of Service** **Main Document**
Sep 24 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Sep 24 2018	Brief amici curiae of Louisiana, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kavanaugh took no part in the consideration or decision of this motion.
Oct 17 2018	Reply of petitioner Gilberto Garza, Jr. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 30 2018	Argued. For petitioner: Amir H. Ali, Washington, D. C. For respondent: Kenneth K. Jorgensen, Lead Deputy Attorney General, Boise, Idaho; and Ailon Kedem, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae).

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No.

IN THE

Supreme Court of the United States

GILBERTO GARZA JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the "presumption of prejudice" recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

TABLE OF CONTENTS

Question Presented i
Table Of Authorities iv
Petition For A Writ Of Certiorari 1
Opinion And Order Below 1
Jurisdiction 1
Constitutional Provisions Involved 1
Introduction 2
Statement Of The Case 4
Reasons For Granting The Petition 7
I. The Question Presented Is The Subject Of An Acknowledged Split. 8
II. The Decision Below Is Wrong And Deeply Troubling. 10
III. The Question Presented Is Important And Recurs Frequently. 12
IV. The Question Presented Is Squarely Presented. 13
Conclusion 14

Appendix A
Garza v. State, 405 P.3d 576 (Idaho 2017) 1a

Appendix B
Garza v. State, 2017 WL 444026
(Idaho Ct. App. Feb. 2, 2017) 16a

Appendix C
Order on Cross-Motions for Summary Adjudication,
State v. Garza, Nos. CV-PC-2015-10589 &
CV-PC-2015-10597 (Idaho Dist. Ct. Feb. 11, 2016) 28a

Appendix D
Plea Agreement, *State v. Garza*, No. CR-FE-2014-
9960 (Idaho Dist. Ct. Jan. 22, 2015) 40a

Appendix E
Plea Agreement, *State v. Garza*, No. CR-FE-2014-
18183 (Idaho Dist. Ct. Feb. 24, 2015) 46a

Appendix F
Affidavit of Paul R. Taber III, *State v. Garza*, No.
CV-PC-2015-10589 (Idaho Dist. Ct. Aug. 6, 2015)..... 51a

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738 (1967) 11, 12

Campbell v. United States, 686 F.3d 353 (6th Cir. 2012) 9, 10

Campusano v. United States, 442 F.3d 770 (2d Cir. 2006) 8, 10, 12

Douglas v. People of State of Cal., 372 U.S. 353 (1963) 12

Gomez-Diaz v. United States, 433 F.3d 788 (11th Cir. 2005) 9

Nunez v. United States, 546 F.3d 450 (7th Cir. 2008) 9

Peguero v. United States, 526 U.S. 23 (1999) 3, 11

Rodriquez v. United States, 395 U.S. 327 (1969) 10, 11

Roe v. Flores-Ortega, 528 U.S. 470 (2000) ..... *passim*

Strickland v. Washington, 466 U.S. 668 (1984) 2

United States v. Garrett, 402 F.3d 1262 (10th Cir. 2005) 9

United States v. Mabry, 536 F.3d 231 (3d Cir. 2008) 9

United States v. Poindexter, 492 F.3d 263 (4th Cir. 2007) 8

United States v. Sandoval-Lopez, 409 F.3d 1193 (9th Cir. 2005) 9

United States v. Tapp, 491 F.3d 263 (5th Cir. 2007) 8

Watson v. United States, 493 F.3d 960 (8th Cir. 2007) 9

Constitutional Provisions

U.S. Const. Amend. VI 1

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d)(1) 13

Idaho Crim. R. 35 4

Other Authorities

Brief of the United States in Opposition, *Solano v. United States*, No. 15-9249 (U.S. Aug. 10, 2016) 13, 14

Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209 (2005) 12

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gilberto Garza Jr. respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Idaho in this case.

OPINION AND ORDER BELOW

The Supreme Court of Idaho's opinion (Pet. App. 1a-15a) is published at 405 P.3d 576. The opinion of the Court of Appeals of Idaho (Pet. App. 16a-27a) has not yet been published, but is currently available at 2017 WL 444026. The district court's opinion (Pet. App. 28a-39a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on November 6, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

INTRODUCTION

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must satisfy the court that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court has recognized that where such a claim is based upon trial counsel's forfeiture of the defendant's right to an appellate proceeding by failing to file a notice of appeal, the defendant need not show "actual prejudice" by "'specify[ing] the points he would raise were his right to appeal reinstated.'" *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) (quoting *Rodriquez v. United States*, 395 U.S. 327, 330 (1969)). Rather, to satisfy *Strickland*'s second prong, the defendant need only show that "but for counsel's deficient conduct, he would have appealed." *Flores-Ortega*, 528 U.S. at 486. This result obtains from a long line of precedent, which draws a clear line between constitutionally deficient performance that causes "a judicial proceeding of disputed reliability" and constitutionally deficient performance that causes "the forfeiture of a proceeding itself." *Flores-Ortega*, 528 U.S. at 483 (citing *Smith v. Robbins*, 528 U.S. 259 (2000); *Penson v. Ohio*, 488 U.S. 75 (1988); *United States v. Cronic*, 466 U.S. 648 (1984)). Because an attorney who fails to file a notice of appeal deprives his client not only of "a *fair* judicial proceeding," but "of the appellate proceeding altogether," his conduct falls in the latter category and "demands a presumption of prejudice." *Id.*

As all three courts below acknowledged, there is a conflict of authority on whether this "presumption of

prejudice" applies where a criminal defendant instructs his trial counsel to file a notice of appeal, but counsel chooses not to do so because the defendant executed a plea agreement that includes an appeal waiver. Pet. App. 6a-8a, 22a-26a, 35a-36a. Eight circuits hold that the presumption applies. In conflict, two circuits, the court below, and a few other state high courts hold that a defendant must demonstrate actual prejudice by specifying the points he would have raised in his direct appeal proceeding.

The decision below is wrong and troubling. While a plea waiver may substantially limit the scope of issues available to a defendant if he chooses to appeal, even the broadest waiver leaves open a number of significant issues, including those going to voluntariness or competence to enter the plea, ineffective assistance of counsel during the plea process, and the legality of the sentence imposed. Where trial counsel refuses a criminal defendant's instruction to file a notice of appeal, counsel thus deprives the defendant of a counseled direct appeal on these issues "altogether." *Flores-Ortega*, 528 U.S. at 483. In such circumstances, it is grossly inequitable to require a defendant, who in all likelihood will be proceeding without counsel, to lay out the issues that could have been appealed. *Peguero v. United States*, 526 U.S. 23, 30 (1999) (O'Connor, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial [habeas] motion.").

The question upon which courts are divided is perfectly presented on this record—indeed it was the decisive legal issue on this claim for all three courts

below. It is undisputed on this record that Petitioner directed his trial counsel to file a notice of appeal and that his counsel declined to do so because his plea agreement included a plea waiver. In the past, the United States has counseled this Court that the appropriate vehicle to resolve the conflict of authority on this issue would involve an appeal waiver that did not also waive collateral review. That's this case. *See infra* Part IV.

The Court should grant certiorari.

STATEMENT OF THE CASE

1. In January and February 2015, respectively, Petitioner entered an *Alford* plea to aggravated assault and a guilty plea to possession of a controlled substance. Both plea agreements included a provision specifying that Petitioner waived his right to appeal. Pet. App. 44a, 49a.[1]

At a joint sentencing hearing, the district court accepted both plea agreements. The court acknowledged that Petitioner's plea agreement included an appeal waiver. CR 132.[2] It nonetheless advised Petitioner about his right to file an appeal and his right to be appointed counsel in the event he chose to appeal. *Id.* In its judgments of conviction, the court again advised Petitioner that he had the right to file an appeal and the right to counsel on appeal. CR 118, 121.

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[1] Petitioner also waived his right to file a motion under a state procedure for correcting or reducing a sentence. Pet. App. 44a, 49a (waiving rights under Idaho Criminal Rule 35).

[2] "CR" refers to the court record on file with the Supreme Court of Idaho, No. 44991.

2. Petitioner filed a *pro se* petition for post-conviction relief asserting that he had instructed his trial counsel to file a notice of appeal in numerous phone calls and letters, and that his counsel rendered ineffective assistance by failing to do so. In response, the government submitted an affidavit from Petitioner's trial counsel, in which trial counsel admitted that Petitioner "told me he wanted to appeal the sentence(s) of the court," and that counsel "did not file the appeal(s) and informed Mr. Garza that an appeal was problematic because he waived his right to appeal." Pet. App. 3a, 52a; CR 148. The government contended that in light of Petitioner's appeal waiver, Petitioner was required to show actual prejudice from the loss of direct appeal proceedings. CR 82.

The district court denied Petitioner's claim. The sole issue addressed by the district court on this claim was whether Petitioner was entitled to the "presumption of prejudice" adopted by this Court in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). The court observed that "[t]he parties agree on" all of the pertinent facts: That (1) Petitioner entered into plea agreements in which he waived the right to appeal; (2) Petitioner asked his trial counsel to file a notice of appeal, despite having waived his right to appeal; and (3) because of the appeal waivers, his trial counsel declined to act on his request to file appeals. Pet. App. 33a.

The court observed that although "there is no United States Supreme Court decision on point, . . . nearly every federal circuit court of appeals has resolved the question this case presents." Pet. App. 35a. It explained that a majority of eight federal circuits hold that the presumption of prejudice

recognized in *Flores-Ortega* applies even where the defendant has signed an appeal waiver, Pet. App. 35a, while a minority of two federal circuits require a showing of actual prejudice, Pet. App. 35a-36a. The court adopted the minority position and dismissed Petitioner's claim on the basis that he had failed to show actual prejudice. Pet. App. 36a-39a.

3. The Court of Appeals of Idaho affirmed. That court similarly recognized that "[f]ederal circuit courts are split on the issue" and "[t]he majority of circuit courts have ruled that an attorney who ignores his or her client's request for an appeal is ineffective, regardless of whether the client waived the right to appeal." Pet. App. 22a. "In such circumstances, the majority rule presumes prejudice" and "[a] client need only show that he or she instructed his or her attorney to appeal in order to demonstrate prejudice under the second *Strickland* prong." Pet. App. 22a (citation omitted). On the other hand, two circuits "have rejected the majority rule" and "maintain that prejudice is not presumed when the defendant waives the right to appeal." Pet. App. 24a. Like the district court, the court of appeals adopted the minority position and dismissed Petitioner's claim for failure to demonstrate actual prejudice. Pet. App. 25a-27a.

4. Petitioner filed a petition for review in the Supreme Court of Idaho, which granted review and affirmed. Like the courts below, the Idaho Supreme Court observed that "[t]here is a federal circuit split regarding the issue" of whether the presumption of prejudice applies given the existence of an appeal waiver "which involves differing interpretations of [this Court's] decision in *Flores-Ortega*." Pet. App. 6a. It recognized that "[a] majority of federal circuit

courts have interpreted *Flores-Ortega* to apply even in situations where the defendant has validly waived his right to appeal." Pet. App. 7a. "Under the majority approach, an attorney is required to file an appeal at his client's request, even if the attorney thinks the appeal would be frivolous" and "[w]hen counsel fails to follow his client's express direction to appeal, prejudice is presumed." Pet. App. 7a. On the other hand, "[t]wo federal circuit courts and a federal district court in an undecided circuit follow the minority approach," which does not presume prejudice in the presence of an appeal waiver and requires the petitioner to make an affirmative showing of prejudice. Pet. App. 8a. The court observed that some state courts of last resort had also adopted the minority approach. Pet. App. 8a-9a.

Adopting the minority position, the court held "that *Flores-Ortega* does not require counsel be presumed ineffective for failing to appeal at the client's direction in situations where there has been a waiver of the right to appeal." Pet. App. 10a. It reasoned: "Once a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal. Thus, the presumption of prejudice articulated in *Flores-Ortega* would not apply after a defendant has waived his appellate rights." Pet. App. 11a. The court affirmed the dismissal of his claim on the basis that Petitioner had not shown actual prejudice. Pet. App. 15a.

REASONS FOR GRANTING THE PETITION

There is a deep and acknowledged split of authority on whether the "presumption of prejudice" recognized in *Flores-Ortega* applies where trial counsel disregards a criminal defendant's instruction

to file a notice of appeal on the basis of an appeal waiver.[3] That question is important, recurs frequently, and is perfectly presented on this record. The Court should grant certiorari.

I. The Question Presented Is The Subject Of An Acknowledged Split.

As recognized by the courts below, eight circuits—the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh—hold that the presumption of prejudice recognized in *Flores-Ortega* applies where counsel disregards his client's direction to file a notice of appeal, irrespective of whether the client signed a plea agreement that includes an appeal waiver. *See Campusano v. United States*, 442 F.3d 770, 773 (2d Cir. 2006) (Sotomayor, J.) (rejecting the government's argument that because "substantive claims were precluded by [Petitioner's] waiver of appeal . . . the *Flores-Ortega* presumption of prejudice should not apply"); *United States v. Poindexter*, 492 F.3d 263, 268-69 (4th Cir. 2007) (presuming prejudice and rejecting government's argument that *Flores-Ortega* "did not involve an appeal waiver"); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007) (holding "that the rule of *Flores-Ortega* applies even where a defendant has waived his right to direct appeal");

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[3] While Petitioner uses the "presumption of prejudice" terminology employed by this Court, it is worth noting that even under *Flores-Ortega*, a criminal defendant maintains the burden of establishing prejudice under *Strickland*. He simply satisfies that burden upon the lesser showing that "but for counsel's deficient conduct, he would have appealed." *Flores-Ortega*, 528 U.S. at 486. On this record, it is undisputed that Petitioner specifically directed his counsel to appeal and thus satisfied this lesser showing.

Campbell v. United States, 686 F.3d 353, 360 (6th Cir. 2012) ("[E]ven when a defendant waives all or most of his right to appeal, an attorney who fails to file an appeal that a criminal defendant explicitly requests has, as a matter of law, provided ineffective assistance of counsel."); *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007) (same); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1197 (9th Cir. 2005) (same); *United States v. Garrett*, 402 F.3d 1262, 1266 (10th Cir. 2005) (same); *Gomez-Diaz v. United States*, 433 F.3d 788, 793 (11th Cir. 2005) (same).

Two circuits—the Third and the Seventh—have reached the opposite conclusion. *See United States v. Mabry*, 536 F.3d 231, 240-41 (3d Cir. 2008) ("The analysis employed [in *Flores-Ortega*] in evaluating an ineffectiveness of counsel claim does not apply when there is an appellate waiver."); *Nunez v. United States*, 546 F.3d 450, 455-56 (7th Cir. 2008) (rejecting application of *Flores-Ortega* and reasoning that "[o]nce a defendant has waived his right to appeal . . . the defendant must show both objectively deficient performance and prejudice"). Both circuits acknowledged that their conclusions conflict with the majority of circuits. *Mabry*, 536 F.3d at 242 ("We . . . will part ways with the approach taken by the majority of courts of appeals."); *Nunez*, 546 F.3d at 453 (recognizing conflict with seven circuits).

As the Idaho Supreme Court observed, at least a few other state high courts have also adopted this minority position. Pet. App. 8a-9a (citing *Stewart v. United States*, 37 A.3d 870, 877 (D.C. 2012); *Buettner v. State*, 363 P.3d 1147, ¶¶ 14-15 (Mont. 2015); *Kargus v. State*, 169 P.3d 307, 320 (Kan. 2007)).

II. The Decision Below Is Wrong And Deeply Troubling.

The minority position is wrong and seriously erodes the Sixth Amendment right to competent counsel and to a counseled direct appeal. As this Court has recognized, "[t]hose whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." *Rodriquez v. United States*, 395 U.S. 327, 330 (1969).

It is easy to fall into the trap of the court below, which, like other courts adopting the minority position, has reasoned that "[o]nce a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal." Pet. App. 11a. But that is simply wrong. It is well-established that "important constitutional rights require some exceptions to the presumptive enforceability of [an appeal] waiver," *Campusano*, 442 F.3d at 774 (Sotomayor, J.), such that "even the broadest waiver does not absolutely foreclose some degree of appellate review." *Campbell*, 686 F.3d at 358. Those issues include, at a minimum, whether the waiver was made knowingly, voluntarily, and competently, whether the government breached the plea agreement, whether the sentence was imposed based upon constitutionally impermissible factors, and other challenges related to the legality of the sentence. *Campusano*, 442 F.3d at 774-75 (Sotomayor, J.). Thus, as in *Flores-Ortega* and *Rodriquez*, counsel's refusal to file a notice of appeal deprives his client of "an appeal altogether." *Flores-Ortega*, 528 U.S. at 483.

Moreover, just as in *Flores-Ortega* and *Rodriquez*, requiring a defendant to make a showing of prejudice after his trial counsel refused his express instruction and thus cost him his right to a counseled appeal would work an untenable burden on the defendant who will now, in all likelihood, be forced to proceed without counsel. *Flores-Ortega*, 528 U.S. at 486 ("[I]t is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal."); *Rodriquez*, 395 U.S. at 330 ("Applicants for relief [on postconviction] must, if indigent, prepare their petitions without the assistance of counsel . . . They would thus be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one."); *Peguero*, 526 U.S. at 30 (O'Connor, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial [habeas] motion.").

This Court established a specific procedure for instances in which trial counsel believes there may be no basis for appeal in *Anders v. California*, 386 U.S. 738 (1967). The solution is not for counsel to unilaterally forfeit their client's right to a counseled direct appeal during the short notice-of-appeal stage. Rather, regardless of the perceived merits of an appeal, trial counsel is to preserve the defendant's right by filing a notice of appeal. Appellate counsel must then "support his client's appeal to the best of his ability," and if he ultimately "finds his case to be

wholly frivolous, after a conscientious examination of it, he should so advise the court . . . accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id.* at 744. The appellate court then conducts "a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* The decision below would "undermine [*Anders*] and the principles of the Sixth Amendment by allowing attorneys who believe their clients' appeals to be frivolous simply to ignore the clients' requests to appeal." *Campusano*, 442 F.3d at 776 (Sotomayor, J.).

III. The Question Presented Is Important And Recurs Frequently.

The importance of this issue—whether an attorney's defiance of his client's instruction to file a notice of appeal appropriately costs that defendant his right to a counseled direct appeal—is self-evident. *See Douglas v. People of State of Cal.*, 372 U.S. 353, 355 (1963) (recognizing that it would be "invidious" to deny criminal defendants the right to a counseled direct appeal).

Given the prevalence of appeal waivers in modern plea agreements, the minority position would effectively nullify the protections afforded in cases like *Flores-Ortega* and *Anders* in certain jurisdictions. *See, e.g.*, Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 231, 232 fig.7 (2005) (observing that 90% of plea agreements in the Ninth Circuit and 65% of plea agreements across all circuits included appeal waivers).

The issue is now of special importance in Idaho. Because the position adopted by the court below conflicts with that of the Ninth Circuit, the standard for whether an attorney has rendered ineffective assistance of counsel will differ depending upon whether the attorney happened to be litigating in state court or federal court. Because such standards influence an attorney's understandings of his or her professional responsibilities, the many attorneys who appear before both state and federal courts face conflicting guidance. Furthermore, criminal defendants in Idaho (as well as Montana and Kansas) will have to engage in federal habeas litigation regarding whether the position adopted below is "contrary to, or involved an unreasonable application of" this Court's precedents. 28 U.S.C. § 2254(d)(1).

IV. The Question Presented Is Squarely Presented.

The question upon which the lower courts are divided was the only issue passed upon by the courts below to dispose of Petitioner's claim and is thus squarely presented. The facts are undisputed and straightforward: Petitioner instructed his trial counsel to appeal and his trial counsel declined to do so on the sole basis that Petitioner had signed plea agreements that included an appeal waiver.

In response to prior petitions for certiorari, the United States has acknowledged that there is a "conflict among the circuits" on the question presented, but counseled the Court to wait for a record that contains an appeal waiver without a waiver of collateral review. *See e.g.*, Brief of the United States in Opposition at 9, *Solano v. United States*, No. 15-9249 (U.S. Aug. 10, 2016). It has repeatedly advised

that because the plea agreements at issue in prior cases included a "waiver of [the] right not only to appeal, but also to bring any collateral challenge," the "conflict among the circuits [was] not . . . implicated." *E.g.*, *id.* at 9, 12-14. The appeal waiver in Petitioner's plea agreements did not include a waiver of collateral review and the conflict is thus squarely presented on this record.

No reasonable argument could be made that this issue requires further percolation. As the courts below acknowledged, "nearly every federal circuit court of appeals has resolved the question this case presents." Pet. App. 35a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 44991

GILBERTO GARZA JR.,	)	
	)	Boise, September
Petitioner-Appellant,	)	2017 Term
	)	
v.	)	2017 Opinion No. 112
	)	
STATE OF IDAHO,	)	Filed: November 6, 2017
	)	
Respondent.	)	Karel A. Lehrman, Clerk

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Jason D. Scott, District Judge.

District court order dismissing petitions for post-conviction relief, affirmed.

Eric D. Fredericksen, Idaho State Appellate Public Defender, Boise, for appellant. Maya P. Waldron, Deputy State Appellate Public Defender argued.

Hon. Lawrence G. Wasden, Idaho Attorney General, Boise, for respondent. Kale Gans, Deputy Attorney General argued.

BURDICK, Chief Justice.

Gilberto Garza, Jr., appeals the Ada County district court's order dismissing his petitions for post-conviction relief. Garza signed two plea agreements relating to charges of aggravated assault and possession of a controlled substance

with intent to distribute. As part of his plea agreements Garza waived his right to appeal. Despite the waivers, Garza instructed his attorney to appeal. Garza's attorney declined to file the appeals, citing the waivers of appeal in the plea agreements. Garza then filed two petitions for post-conviction relief, alleging his counsel was ineffective for failing to appeal. The district court dismissed Garza's petitions concluding Garza's counsel was not ineffective in failing to appeal. The Court of Appeals agreed and affirmed. We granted Garza's timely petition for review and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal involves two underlying convictions and two corresponding petitions for post-conviction relief.[1] On January 23, 2015, Garza entered an *Alford* plea to aggravated assault (assault case), and on February 24, 2015, he pleaded guilty to possession of a controlled substance with intent to deliver (possession case). The plea agreements bound the district court to sentence Garza to five years in prison for the assault case (two years fixed, three indeterminate), and another five years in prison for the possession case (one year fixed, four indeterminate). The sentences were to run consecutively, along with another prison sentence previously imposed on Garza. The district court accepted the plea agreements and imposed sentence in accordance with them on the same day Garza entered the possession plea. In both binding

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[1] The convictions were based on two Idaho Criminal Rule 11 plea agreements that were part of a global agreement that included a third case and other unfiled charges.

Idaho Criminal Rule 11(f)(1)(c) plea agreements, Garza waived his right to appeal, and waived his right to request relief pursuant to Idaho Criminal Rule 35. The court acknowledged that Garza had waived his right to appeal, but advised Garza of his appeal rights anyway. Garza did not appeal the convictions or sentences in the underlying cases.

Approximately four months later, Garza filed a petition for post-conviction relief in each case, asserting among other things that his trial attorney was ineffective for not filing notices of appeal. Garza stated in his affidavit submitted in the possession case that he asked his attorney to appeal, and in his affidavit submitted in his assault case that his attorney failed to appeal despite numerous phone calls and letters from Garza. Garza's former attorney stated in an affidavit that he did not file an appeal because Garza "received the sentence(s) he bargained for in his [plea] agreement" and "an appeal was problematic because [Garza] waived his right to appeal in his Rule 11 agreements."

The court appointed an attorney for Garza and issued a notice of intent to dismiss all of Garza's claims except for his claim of ineffective assistance of counsel. After both parties responded to the notice, the court dismissed all post-conviction claims except for the ineffective assistance of counsel claim regarding the failure to file an appeal. The parties then filed cross- motions for summary adjudication on Garza's remaining claim for post-conviction relief, where Garza sought a reopening of the appeals period in the underlying criminal cases on the basis of ineffective assistance of counsel. The district court dismissed Garza's

petitions, and the Court of Appeals affirmed. We granted Garza's timely petition for review.

II. ISSUE ON APPEAL

1. Was Garza's attorney ineffective when he did not file an appeal after Garza requested it even though Garza had waived his right to appeal as part of a Rule 11 plea agreement?

III. STANDARD OF REVIEW

When addressing a petition for review, this Court will give "serious consideration to the views of the Court of Appeals, but directly reviews the decision of the lower court." *State v. Schall*, 157 Idaho 488, 491, 337 P.3d 647, 650 (2014) (quoting *State v. Oliver*, 144 Idaho 722, 724, 170 P.3d 387, 389 (2007)). "Proceedings for post-conviction relief are civil in nature, rather than criminal, and therefore the applicant must prove the allegations in the request for relief by a preponderance of the evidence." *State v. Dunlap*, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013). The district court may grant a motion by either party for summary disposition for post-conviction relief when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. I.C. § 19-4906(c). This Court exercises free review over the district court's "determination as to whether constitutional requirements have been satisfied in light of the facts found." *Dunlap*, 155 Idaho at 361, 313 P.3d at 17 (quoting *State v. Pearce*, 146 Idaho 241, 248, 192 P.3d 1065, 1072 (2008)).

IV. ANALYSIS

A criminal defendant is permitted to waive his right to appeal as part of a plea agreement. *State v.*

Murphy, 125 Idaho 456, 457, 872 P.2d 719, 720 (1994). The waiver is valid and will be upheld as long as it was entered into knowingly, voluntarily, and intelligently as part of a plea agreement. *Id.* In this case, the district court found that Garza did not show that his plea was not knowing, voluntary, or intelligent, nor did Garza raise this issue on appeal. The sole issue remaining is whether, despite the appeal waiver, Garza still had the right to appeal and therefore his counsel was ineffective for failing to file an appeal at his request.

This Court has not yet decided whether counsel is ineffective if counsel denies his client's request to file an appeal when the client waived the right to appeal in a binding Idaho Criminal Rule 11 plea agreement. Garza argues that the district court erred in requiring him to show, rather than presuming, his counsel was deficient and that Garza was prejudiced when his attorney declined to file an appeal in light of the waiver. For the reasons discussed below, we affirm the district court's dismissal of Garza's petitions for post-conviction relief.

Criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance. *Roe v. Flores-Ortega*, 528 U.S. 470, 476 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *see also Booth v. State*, 151 Idaho 612, 617, 262 P.3d 255, 260 (2011). A defendant claiming ineffective assistance of counsel must show that (1) counsel's representation was deficient; and (2) counsel's deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 688–92; *Self v. State*, 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct. App. 2007). To show counsel was deficient, the defendant has

the burden of showing that his attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Generally, when trial counsel fails to file an appeal at a criminal defendant's request, such performance is professionally unreasonable and therefore deficient. *Flores-Ortega*, 528 U.S. at 477; *Beasley v. State*, 126 Idaho 356, 362, 883 P.2d 714, 720 (Ct. App. 1994). To show that counsel's deficient performance was prejudicial, the defendant must show there is a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 669; *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. This test applies to claims that counsel was ineffective for failing to file a notice of appeal. *Flores-Ortega*, 528 U.S. at 477. However, whether counsel was ineffective becomes unclear when the reason the attorney did not file the appeal is because the client waived the right to appeal as part of a plea agreement.

Neither the United States Supreme Court nor this Court have decided whether an attorney has provided ineffective assistance of counsel if the attorney declines to file an appeal after a defendant has requested it, when the defendant has waived the right to appeal as part of a plea agreement. There is a federal circuit split regarding the issue, which involves differing interpretations of the United State Supreme Court's decision in *Flores-Ortega*. The *Flores- Ortega* case did not involve an appeal waiver, but rather dealt with whether an attorney provided ineffective assistance of counsel when she failed to appeal because it was

unclear if her client wanted to appeal. *See Flores-Ortega*, 528 U.S. at 475. The Court held "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id.* at 484.

A majority of federal circuit courts have interpreted *Flores-Ortega* to apply even in situations where the defendant has validly waived his right to appeal. Those circuits hold that attorneys are ineffective when they do not file an appeal after the clients requested it, regardless of whether the defendants had waived their rights. *See Campbell v. United States*, 686 F.3d 353, 360 (6th Cir. 2012); *United States v. Poindexter*, 492 F.3d 263, 265 (4th Cir. 2007); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007); *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007); *Campusano v. United States*, 442 F.3d 770, 775 (2d Cir. 2006); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1198 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262, 1267 (10th Cir. 2005); *Gomez-Diaz v. United States*, 433 F.3d 788, 794 (11th Cir. 2005). Under the majority approach, an attorney is required to file an appeal at his client's request, even if the attorney thinks the appeal would be frivolous. *Campusano*, 442 F.3d at 771–72. When counsel fails to follow his client's express direction to appeal, prejudice is presumed. *Id.* at 772. "The prejudice in failure to file a notice of appeal cases is that the defendant lost his chance to file the appeal, not that he lost a favorable result

that he would have obtained by appeal." *Sandoval-Lopez*, 409 F.3d at 1197.[2]

Two federal circuit courts and a federal district court in an undecided circuit follow the minority approach and hold that *Flores-Ortega* does not require an attorney be presumed ineffective for failing to appeal upon request when there has been a waiver of the right to appeal. *See Nunez v. United States*, 546 F.3d 450, 456 (7th Cir. 2008), *vacated on other grounds by Nunez v. United States*, 554 U.S. 911 (2008); *United States v. Mabry*, 536 F.3d 231, 242 (3d Cir. 2008); *Maes v. United States*, No. 15-CV-240-SM, 2015 WL 9216583, at *3 (D.N.H. Dec. 16, 2015). The minority approach does not presume deficiency or prejudice when an attorney denies his client's instruction to file an appeal when there has been an appeal waiver, and instead requires the defendant meet the test in *Strickland*, which requires showing deficient performance and prejudice. *Nunez*, 546 F.3d at 456. The minority approach holds that when a defendant waives his appellate rights, he no longer has a right to appeal, and therefore an attorney is not bound to file an appeal at his client's request. *Id.* at 455.

Though few other states have addressed the issue, the ones who have continue to apply the

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[2] While the Ninth Circuit follows the majority approach, its language in *Sandoval-Lopez* seems to indicate it has doubts about the policy considerations implicated under the majority approach. The court expressed that the defendant's appeal would likely have been dismissed or he would have lost, and it was likely wise for his attorney to not file the appeal as it was in breach of the plea agreement. *Sandoval-Lopez*, 409 F.3d at 1197.

Strickland test. *See Buettner v. State*, 2015 MT 348N, ¶¶ 14–15 (Mont. 2015) (applying the two-prong test of *Strickland* to determine that counsel was not ineffective in failing to file a notice of appeal); *People v. Miller*, 784 N.Y.S.2d 680, 681–82 (N.Y. App. Div. 2004) ("Where, as here, a defendant makes an informed and intelligent waiver of the right to appeal, ordinarily he or she will be precluded from arguing ineffective assistance of counsel, except to the extent that the claimed ineffective assistance impacts upon the voluntariness of the plea."); *Stewart v. United States*, 37 A.3d 870, 877 (D.C. Ct. App. 2012) (holding *Flores-Ortega* did not control when there had been an appeal waiver, and stating that "[defendant's] claim of ineffective assistance of counsel in relation to the failure to file a notice of appeal is palpably incredible . . . ."); *Kargus v. State*, 169 P.3d 307, 320 (Kan. 2007) (citing Kan. Admin. Regs. § 105-3-9) (applying a modified adaptation of *Flores-Ortega*, however, it is limited by statutory language stating an attorney must "file notice of appeal in a timely manner, unless a waiver of the right to appeal has been signed by the defendant").

In a recent case, this Court discussed *Flores-Ortega* in the context of an ineffective assistance of counsel claim when counsel did not consult with a defendant about filing an appeal after the defendant waived his right to appeal. *McKinney v. State*, 162 Idaho 286, ___, 396 P.3d 1168, 1171–72 (2017). In *McKinney*, a defendant waived his right to appeal as part of a Rule 11 sentencing agreement, and then sought post-conviction relief on the ground that his attorney was ineffective for not consulting

with him about appealing his sentence, despite having waived his appeal rights in the plea. *Id.* at ___, 396 P.3d at 1179. This Court interpreted *Flores-Ortega* to not compel a bright-line presumption of deficiency or prejudice in the failure to consult context. *Id.* Rather, this Court considered whether counsel's failure to consult with the defendant about filing an appeal was deficient conduct that prejudiced the defendant, and concluded it was not. *Id.*

In this case, we decline to presume counsel ineffective for failing to appeal at Garza's request when Garza has waived the right to appeal as part of a plea agreement. Rather, to show ineffective assistance of counsel, Garza must show deficient conduct and resulting prejudice. In so holding, we conclude that *Flores-Ortega* does not require counsel be presumed ineffective for failing to appeal at the client's direction in situations where there has been a waiver of the right to appeal, as there was here.

> The *Flores-Ortega* Court made clear that a presumption of prejudice applies in the context of an ineffectiveness claim because an attorney's deficient performance deprives the defendant of his or her opportunity for an appellate proceeding. Notably, *Flores- Ortega* did not address whether this principle has any force, let alone controls, where the defendant has *waived* his right to appellate and collateral review.

Mabry, 536 F.3d at 240 (citations omitted). In fact, the Court in *Flores-Ortega* stated, "The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time *and to which he had a right*, similarly demands a presumption of

prejudice." 528 U.S. at 483 (emphasis added). Once a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal. Thus, the presumption of prejudice articulated in *Flores- Ortega* would not apply after a defendant has waived his appellate rights. Therefore, an attorney who declines to file the appeal when there has been a waiver will not be presumed ineffective, nor will the attorney be found to have violated the Idaho Rules of Professional Conduct.

This approach is consistent with other areas of Idaho law. Idaho courts do not presume a defendant is prejudiced when an attorney fails to follow his client's instruction to file a Rule 35 motion, despite the client having the right to do so. *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995).

> [T]o prevail on a claim of ineffective assistance of counsel an applicant . . . must show both that counsel's performance was deficient and that the deficiency prejudiced the applicant. Where the alleged deficiency is counsel's failure to file a . . . motion, a conclusion that the motion, if pursued, would not have been granted, is generally determinative of both prongs of the test. If the motion lacked merit and would have been denied, counsel ordinarily would not be deficient for failing to pursue it, and, concomitantly, the petitioner could not have been prejudiced by the want of its pursuit.

Id. (quoting *Huck v. State*, 124 Idaho 155, 158–59, 857 P.2d 634, 637–38 (Ct. App. 1993)). As the district court correctly stated, "[i]t would seem

anomalous to presume prejudice in the failure-to-appeal context when the defendant waived the right to appeal, yet not presume prejudice in the Rule 35 context even when the defendant has not waived the right to file a Rule 35 motion." Other Idaho cases have adopted similar policies regarding when counsel is ineffective:

> When considering whether an attorney's failure to file or pursue a motion to suppress or strike evidence constitutes incompetent performance, the court is required to examine the probability of success of such a motion in order to determine whether counsel's decision against pressing the motion was within the wide range of permissible discretion and sound trial strategy. In *Carter v. State*, 108 Idaho 788, 794-795, 702 P.2d 826, 832-33 (1985), the Idaho Supreme Court held that counsel's failure to move to suppress the defendant's confession constituted ineffective assistance because it was obvious that the confession would have been suppressed. In *Maxfield v. State*, 108 Idaho 493, 501, 700 P.2d 115, 123 (Ct. App. 1985), we held that newly appointed counsel's failure to renew a motion to suppress was not deficient, since previous counsel had been unsuccessful on the same motion and no new grounds existed. Because it was clear that the new motion would have been denied as well, counsel's failure to make the motion was not deficient. See also, *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989), (counsel's failure to timely file a motion to suppress evidence seized from defendant's home was not deficient because defendant had failed to show that the items

would have been suppressed); *State v. Youngblood*, 117 Idaho 160, 165, 786 P.2d 551, 556 (1990) (failure to move to suppress items seized was not error where items were obviously subject to plain view exception to exclusionary rule); *State v. Walters*, 120 Idaho 46, 56, 813 P.2d 857, 867 (1991) (failure of counsel to object to inadmissible opinion testimony was ineffective assistance.)

Huck, 124 Idaho at 158, 857 P.2d at 637. While the above cases do not deal with appeal waivers specifically, they show the policy of this Court to not presume counsel ineffective automatically when counsel exercises judgment in declining to file a motion where it would obviously be denied, or where the motion had previously been unsuccessful. *See Davis*, 116 Idaho at 406, 775 P.2d at 1248.

Moreover, a criminal defense attorney has a duty to the judicial system to exercise professional judgment and not file frivolous litigation, "and an appeal in the teeth of a valid waiver is frivolous." *Nunez*, 546 F.3d at 455; *See also* Idaho Rules of Professional Conduct 3.1. The defendant, even if allowed his appeal, will very likely still have his appeal dismissed as a result of the waiver, and "[t]here is no point in a constitutional rule that would yield an exercise in futility." *Nunez*, 546 F.3d at 456. Garza's attorney chose to exercise professional judgment and uphold the plea agreements that contained his client's original desire to waive his right to appeal. Such an exercise of judgment that keeps frivolous and futile litigation out of the courts will not be presumed ineffective assistance of counsel.

Additionally, a plea agreement is a bilateral contract, to which both the State and defendant are bound. *McKinney*, 162 Idaho at ___, 396 P.3d at 1178. Once a defendant has accepted the plea, he should be bound by the waiver therein. *Nunez*, 546 F.3d at 455. "Empty promises are worthless promises; if defendants could retract their waivers . . . then they could not obtain concessions by promising not to appeal." *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995). "[Garza] exchanged the right to appeal for prosecutorial concessions; he cannot have his cake and eat it too." *Id.* Moreover, a lawyer has a duty to avoid taking actions that will cost their client the benefit of the plea bargain. *Nunez*, 546 F.3d at 455. If an attorney files an appeal despite a waiver in the plea agreement, the agreement may be breached, and the State may now be entitled to disregard the plea in its entirety. Here, filing an appeal would have been a direct violation of the plea agreement, and the State would have been free to revoke the benefits of the plea given to Garza. When Garza's attorney declined to file an appeal because the right to appeal had been waived, counsel ensured Garza would not be in breach of the plea. We are cognizant that there are conceivable situations where a defendant who has waived his right to appeal as part of a plea agreement may still seek to challenge his conviction or sentence, for example if he is sentenced illegally or the State breaches the plea agreement. This is properly done in a petition for post-conviction relief or writ of habeas corpus, rather than on direct appeal.

In this case, we decline to presume Garza's counsel ineffective when counsel failed to file an

appeal at Garza's request because of the appeal waiver. Rather, to show ineffective assistance of counsel for failing to appeal in light of the waiver, Garza needed to show both deficient performance and resulting prejudice. The district court concluded that Garza was unable to show any non-frivolous grounds for appeal, and therefore could not show prejudice. Accordingly, we affirm the district court's dismissal of Garza's petitions for post-conviction relief.

V. CONCLUSION

We affirm the district court's dismissal of Garza's petitions for post-conviction relief. This Court does not presume counsel to be automatically ineffective when counsel declines to file an appeal in light of an appeal waiver. Rather, a defendant needs to show deficient performance and resulting prejudice to prove ineffective assistance of counsel. Because Garza cannot show such grounds, his petitions for post-conviction relief were properly dismissed by the district court, and the district court is affirmed.

Justices JONES, HORTON, BRODY and TROUT, Pro Tem, **CONCUR.**

APPENDIX B

COURT OF APPEALS OF IDAHO

[filed February 2, 2017]

Gilberto GARZA Jr., Petitioner-Appellant, v. STATE of Idaho, Respondent.	Docket Nos. 44015/44016

GUTIERREZ, Judge

Gilberto Garza Jr. appeals from the district court's summary dismissal of Garza's petitions for post-conviction relief. Specifically, Garza argues the district court erred because Garza's counsel rendered ineffective assistance by failing to file notices of appeal. For the reasons explained below, we affirm the district court.

I.

FACTUAL AND PROCEDURAL BACKGROUND

These consolidated appeals involve two underlying convictions and two post-conviction relief petitions. In Case No. CR–2014–09960, Garza entered an *Alford* [1] plea to aggravated assault, pursuant to Idaho Code §§ 18–901(a) and 18–905(a). In Case No. CR–2014–18183, Garza pled guilty to possession of a controlled substance with intent to distribute, pursuant to Idaho Code § 37–2732(a)(1)(A). Garza waived his right to appeal in

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[1] *See North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

both cases under binding Idaho Criminal Rule 11(f)(1)(C) plea agreements. At a joint sentencing hearing, the district court accepted the plea agreements.

Despite having waived his right to appeal, Garza instructed his attorney to file notices of appeal. His attorney declined, and no appeals were filed. Garza filed two petitions for post-conviction relief, which included allegations that his trial counsel was ineffective in failing to file notices of appeal within the forty-two-day limit. Garza's trial counsel noted in an affidavit that he "did not file the appeal(s) and informed Mr. Garza that an appeal was problematic because he waived his right to appeal in his Rule 11 agreements."

Garza filed motions for summary judgment and argued his right to appeal should be reinstated. The State cross-filed motions for summary dismissal. In addressing the motions, the district court focused on whether Garza's counsel was ineffective in failing to file appeals despite Garza's waiver of his appellate rights. The district court recognized that the issue is currently undecided in Idaho and that eight federal circuit courts adhere to the majority rule—prejudice is presumed when an attorney disregards the client's instruction to file an appeal, even if the client waived the right to appeal. The district court also considered the minority rule followed by two federal circuit courts—if a defendant waives his or her appellate rights, prejudice is not presumed when the attorney fails to file notices of appeal. The district court ultimately followed the minority rule and did not presume that counsel's failure to file notices of appeal was prejudicial. Instead, the district court required Garza to show prejudice and, specifically, to

show nonfrivolous grounds for appeal (either that the appeal waiver is invalid or unenforceable or that the issues Garza wants to pursue on appeal are outside the scope of the waiver). Because Garza did not make any such showing, the district court summarily dismissed Garza's petitions. Garza timely appeals.

II.

ANALYSIS

Garza argues the district court erred in summarily dismissing his petitions for post-conviction relief. A petition for post-conviction relief initiates a proceeding that is civil in nature. I.C. § 19–4907; *Rhoades v. State*, 148 Idaho 247, 249, 220 P.3d 1066, 1068 (2009); *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). A petition for post-conviction relief differs from a complaint in an ordinary civil action. *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004). A petition must contain much more than a short and plain statement of the claim that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, a petition for post-conviction relief must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records, or other evidence supporting its allegations must be attached or the petition must state why such supporting evidence is not included with the petition. I.C. § 19–4903. In other words, the petition must present or be

accompanied by admissible evidence supporting its allegations or the petition will be subject to dismissal. *Wolf v. State*, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011).

Idaho Code Section 19–4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to a motion by a party or upon the court's own initiative, if it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When considering summary dismissal, the district court must construe disputed facts in the petitioner's favor, but the court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). Moreover, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather, the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). Such inferences will not be disturbed on appeal if the uncontroverted evidence is sufficient to justify them. *Id.*

Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a prima facie

case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary dismissal of a claim for post-conviction relief is appropriate when the court can conclude, as a matter of law, that the petitioner is not entitled to relief even with all disputed facts construed in the petitioner's favor. For this reason, summary dismissal of a post-conviction petition may be appropriate even when the State does not controvert the petitioner's evidence. *See Roman*, 125 Idaho at 647, 873 P.2d at 901.

Conversely, if the petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, the post-conviction claim may not be summarily dismissed. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); *Sheahan v. State*, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct. App. 2008). If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues. *Goodwin*, 138 Idaho at 272, 61 P.3d at 629.

On appeal from an order of summary dismissal, we apply the same standards utilized by the trial courts and examine whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief. *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010); *Sheahan*, 146 Idaho at 104, 190 P.3d at 923. Over questions of law, we exercise free review. *Rhoades*, 148 Idaho at 250, 220 P.3d at 1069; *Downing v.*

State, 136 Idaho 367, 370, 33 P.3d 841, 844 (Ct. App. 2001).

In his petitions for post-conviction relief, Garza alleged his attorney rendered ineffective assistance of counsel by failing to file notices of appeal. A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. *Barcella v. State*, 148 Idaho 469, 477, 224 P.3d 536, 544 (Ct. App. 2009). To prevail on an ineffective assistance of counsel claim, the petitioner must show that the attorney's performance was deficient and that the petitioner was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 2064–65, 80 L.Ed.2d 674, 693 (1984); *Self v. State*, 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct. App. 2007). To establish a deficiency, the petitioner has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Knutsen v. State*, 144 Idaho 433, 442, 163 P.3d 222, 231 (Ct. App. 2007). To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177; *Knutsen*, 144 Idaho at 442, 163 P.3d at 231. This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Gonzales v. State*, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011).

As noted, it is currently undecided in Idaho whether counsel is ineffective in failing to file an appeal upon the defendant's request for an appeal, despite the defendant having waived the right to appeal as part of a plea agreement. Federal circuit courts are split on the issue. The majority of circuit courts have ruled that an attorney who ignores his or her client's request for an appeal is ineffective, regardless of whether the client waived the right to appeal. *See Campbell v. United States*, 686 F.3d 353 (6th Cir. 2012); *Watson v. United States*, 493 F.3d 960 (8th Cir. 2007); *United States v. Tapp*, 491 F.3d 263 (5th Cir. 2007); *United States v. Poindexter*, 492 F.3d 263 (4th Cir. 2007); *Campusano v. United States*, 442 F.3d 770 (2d Cir. 2006); *Gomez–Diaz v. United States*, 433 F.3d 788 (11th Cir. 2005); *United States v. Sandoval–Lopez*, 409 F.3d 1193 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262 (10th Cir. 2005). In such circumstances, the majority rule presumes prejudice. *Campusano*, 442 F.3d at 772. A client need only show that he or she instructed his or her attorney to appeal in order to demonstrate prejudice under the second *Strickland* prong. *Poindexter*, 492 F.3d at 268–69.

The majority rule primarily relies on *Roe v. Flores–Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) for support. *See, e.g., Poindexter*, 492 F.3d at 268. In *Flores–Ortega*, the United States Supreme Court addressed whether an attorney's performance was deficient in failing to file a notice of appeal when the defendant did not clearly express whether he wanted to appeal. *Flores–Ortega*, 528 U.S. at 477, 120 S.Ct. at 1034–35, 145 L.Ed.2d at 994–95. The Supreme Court first noted that it has "long held that a lawyer who disregards specific

instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.* at 477, 120 S.Ct. at 1035, 145 L.Ed.2d at 995. Then, in specifically addressing the issue before the Court under the performance prong of the *Strickland* test, the Supreme Court ruled that an attorney has a constitutionally imposed duty to consult with his or her client "when there is reason to think either (1) that a rational defendant would want to appeal ... or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores–Ortega*, 528 U.S. at 480, 120 S.Ct. at 1036, 145 L.Ed.2d at 996–97. This is because "the decision to appeal rests with the defendant." *Id.* at 479, 120 S.Ct. at 1035–36, 145 L.Ed.2d at 996.

Turning to the prejudice prong of the *Strickland* standard, the Supreme Court further ruled that "the even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right ... demands a presumption of prejudice." *Flores–Ortega*, 528 U.S. at 483, 120 S.Ct. at 1038, 145 L.Ed.2d at 998–99. Thus, the Supreme Court held, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to appeal." *Id.* at 484, 120 S.Ct. at 1039, 145 L.Ed.2d at 1000. The circuit courts following the majority approach interpret this language to support the proposition that prejudice is presumed when an attorney ignores a defendant's instruction to file a timely notice of appeal even when a defendant has waived his or her appellate rights. *See, e.g.*,

Campbell, 686 F.3d at 357. Notably, the defendant in *Flores–Ortega* did not waive his right to appeal. Regardless, the majority rule provides "it is only when the defendant either does not make his appellate wishes known or does not clearly express his wishes that an attorney has some latitude in deciding whether to file an appeal." *Poindexter*, 492 F.3d at 269. Accordingly, under the majority rule, an attorney is under an obligation to file an appeal if a defendant unequivocally instructs his or her attorney to file a timely notice of appeal. *Id.* "Simply put, *Flores–Ortega* reaffirms the time-honored principle that an attorney is not at liberty to disregard the appellate wishes of his client." *Poindexter*, 492 F.3d at 269. This is the case even when filing an appeal is contrary to the plea agreement or harmful to the defendant. *Sandoval–Lopez*, 409 F.3d at 1197.

Two circuit courts have rejected the majority rule. These circuits maintain that prejudice is not presumed when the defendant waives the right to appeal and the attorney fails to file an appeal upon the defendant's request. *See Nunez v. United States*, 546 F.3d 450 (7th Cir. 2008) *vacated on other grounds by Nunez v. United States*, 554 U.S. 911, 128 S.Ct. 2990, 171 L.Ed.2d 879 (2008); *United States v. Mabry*, 536 F.3d 231 (3d Cir. 2008). Because prejudice is not presumed, the defendant must show nonfrivolous grounds for appeal. *Nunez*, 546 F.3d at 456.

In *Nunez*, the Seventh Circuit observed that an attorney has a judicial duty to avoid frivolous litigation, "and an appeal in the teeth of a valid waiver is frivolous." *Id.* at 455. An attorney also has a duty to avoid taking steps that will cost the defendant the benefit of the plea agreement. *Id.* Of

course, a defendant may elect to withdraw the plea and instruct his or her attorney to subsequently file a notice of appeal—this "amounts to a declaration by the defendant of willingness to give up the plea's benefits, and withdrawal would abrogate the waiver too." *Id.* But with the waiver in effect, the *Nunez* court ruled the attorney's "duty to protect his client's interests militates against filing an appeal." *Id.* This is because the benefits of the plea agreement are jeopardized if an attorney disregards the waiver and files an appeal. *Id.* The Seventh Circuit further held that "a lawyer should do what's best for the client, which usually means preserving the benefit of the plea bargain. That this approach also honors the lawyer's duty to avoid frivolous litigation is an extra benefit." *Id.*

Following suit, the Third Circuit agreed with the approach in *Nunez* and adopted the minority rule. *Mabry*, 536 F.3d at 241. The court in *Mabry* held that the majority rule "curiously ... focuses not on the waiver but on the importance of the right to appeal" and, in doing so, "applie[s] *Flores–Ortega* to a situation in which it simply does not 'fit.' " *Mabry*, 536 F.3d at 233, 241. Pointing out the absence of a waiver in *Flores–Ortega*, the court noted that "surely, the right to appeal that has been waived stands on a different footing from a preserved right to appeal, both conceptually and in relation to counsel's duty to his client with respect thereto." *Id.* at 242. *Mabry* focused on the validity of the waiver as a threshold issue and ended the analysis after concluding the defendant's waiver was valid—without addressing the *Strickland* test. *Mabry*, 536 F.3d at 242.

We are persuaded by the minority approach. Once a defendant makes the decision to waive his or her

rights to appeal, the defendant "has no right to countermand such a formal choice." *Nunez*, 546 F.3d at 455. Garza exchanged his right to appeal for prosecutorial concessions. He "cannot have his cake and eat it too." *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995).

It is true that a defendant may still file a notice of appeal after waiving his or her appellate rights—but the appellate waiver denies the defendant a decision on the merits. This is because, as a result of the waiver, he lacks the right to appeal. As the district court noted, "because [Garza] waived the right to appeal, all he loses is the opportunity to see his appeal dismissed without a decision on the merits. This short-circuited appellate proceeding is not the kind of 'entire judicial proceeding' whose loss demands a presumption of prejudice." (quoting *Flores-Ortega*, 528 U.S. at 483, 120 S.Ct. at 1038, 145 L.Ed.2d at 998–99). Moreover, forcing an attorney to file an appeal—despite a waiver of appellate rights—impedes an attorney's ability to exercise professional judgment in deciding whether to file a notice of appeal. *See Nunez*, 546 F.3d at 456. An attorney has a duty to avoid frivolous litigation, and filing a futile appeal is frivolous. Frivolous appeals drain judicial resources and jeopardize the integrity of the judicial system.

Furthermore, while the majority rule purports to safeguard a defendant's rights, the minority approach better protects defendants. When a defendant waives his or her appellate rights pursuant to a plea agreement, and the attorney then follows the defendant's instructions to file an appeal, the defendant's plea agreement is rendered meaningless. The State may then withdraw

concessions and would likely be hesitant to make future concessions with that defendant. On a bigger scale, "if defendants could retract their waivers ... then they could not obtain concessions by promising not to appeal." *Wenger*, 58 F.3d at 282. In sum, the minority rule advances the attorney's duty to preserve the benefit of the plea agreement—thereby protecting the defendant.

Because prejudice is not presumed, Garza was required to make a showing of prejudice with evidence that the waiver was invalid or unenforceable or that the claimed issues on appeal were outside the scope of the waiver. Garza has made no such showing or argument. Therefore, the district court did not err in summarily dismissing Garza's petitions for post-conviction relief.

III.

CONCLUSION

The district court did not err in summarily dismissing Garza's petitions for post-conviction relief because, given that Garza waived his right to appeal, his counsel was not ineffective in refusing to file notices of appeal. We affirm the district court. Costs awarded to the respondent on appeal.

Judge MELANSON and Judge HUSKEY concur.

APPENDIX C

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

[filed February 11, 2016]

STATE OF IDAHO Plaintiff, vs. GILBERTO GARZA, JR., Defendant	Case Nos. CV-PC-2015-10589 CV-PC-2015-10597 ORDER ON CROSS-MOTIONS FOR SUMMARY ADJUDICATION

On January 23, 2015, Gilberto Garza Jr. entered an *Alford* plea to aggravated assault in violation of I.C. §§ 18-901(a) and 18-905(a) in Ada County Case No. CR-FE-2014-09960 ("Aggravated-Assault Case"). Additionally, on February 24, 2015, he pleaded guilty to possessing a controlled substance with intent to deliver in violation of I.C. § 37-2732(a) in Ada County Case No. CR-FE-2014-18183 ("Possession-With-Intent Case"). Garza entered those pleas under I.C.R. 11(f)(1)(C) plea agreements. The plea agreements, if accepted, bound the Court to sentence Garza to five years in prison (two years fixed and three years indeterminate) in the Aggravated-Assault Case, as well as to another five years in prison (one year fixed and four years indeterminate) in the Possession-

With-Intent Case. Under the plea agreements, those bargained-for sentences were to run consecutive to both one another and a lengthy prison sentence Garza had just begun serving in another case, in which he was convicted of grand theft. Immediately after Garza pleaded guilty in the Possession-With-Intent Case, the Court accepted the plea agreements and imposed sentence in accordance with them.

The plea agreements barred Garza from appealing the convictions and sentences. Each plea agreement says that "Defendant Gilberto Garza Jr. waives his right to appeal . . . ." (Answers Pets. Post-Conviction Relief Ex. 1.) Both plea agreements are signed by Garza, and both appeal-waiver provisions are initialed by him. (Id.)

Despite having waived his right to appeal, Garza asked his trial counsel to file appeals. (Taber Affs. ¶ 11.) Garza's trial counsel says Garza acknowledged the appeal waivers in asking trial counsel to file appeals, but told trial counsel he wanted to file appeals anyway. (Id.) Because of the appeal waivers, Garza's trial counsel declined to file appeals. (Id.) Thus, no appeals were filed, despite Garza's expressed desire to file them.

About four months after receiving bargained-for consecutive sentences, Garza filed petitions for post-conviction relief in relation to the two underlying cases. With one exception, his post-conviction claims were summarily dismissed in an order entered on August 26, 2015. One dismissed claim was that Garza's pleas were involuntary. After notice, the Court dismissed that claim for lack of supporting evidence. Garza's remaining claim is

that, despite the appeal waivers, his trial counsel's failure to file appeals at his request constitutes ineffective assistance of counsel. Consequently, he asks the Court to reenter judgment in both underlying cases, thus reinstating his opportunity to appeal the bargained-for consecutive sentences.

In accordance with an amended scheduling order entered on December 2, 2015, the parties filed cross-motions for summary adjudication of Garza's remaining claim. The State of Idaho contends Garza's appeal waivers negated the duty his trial counsel otherwise would have had to file appeals at his request. The State also contends Garza was not prejudiced by his trial counsel's decision not to file appeals at his request, given the appeal waivers, even though prejudice would have been presumed in the absence of appeal waivers. Garza contends, by contrast, that the appeal waivers did not negate his trial counsel's duty to file appeals at his request, and that he is presumed to have been prejudiced by the non-filing of appeals, despite the appeal waivers.

As something of a side note, Garza points out that the Court did not discuss the appeal waivers with him during his plea hearings in the two underlying cases. (Mem. Supp. Pet'r's Mot. Summ. J. 3.) Discussing the appeal waivers was required by rule, assuming they had been called to the Court's attention. *See* I.C.R. 11(d)(3). Any failure of the Court to comply with that rule is not, however, relevant to whether Garza's trial counsel rendered ineffective assistance by not filing appeals at his request. Non-compliance with Rule 11(d)(3) would have been relevant to Garza's already-dismissed claim that his pleas were involuntary, had he

contended he did not appreciate or understand the appeal waivers when he entered his pleas. But Garza has never so contended at any stage of these post-conviction cases.[1]

The amended scheduling order permitted each party (i) to file a response to the other party's motion for summary adjudication, and (ii) to request oral argument on the cross-motions. Neither party availed itself of either opportunity, freeing the Court to decide the cross-motions based solely on the parties' respective moving papers, without oral argument. The Court determined, however, that supplemental submissions would be helpful. Consequently, on January 6, 2016, the Court entered an order giving Garza until January 27, 2016, to identify the issues he wants to pursue on appeal in the two underlying cases, as well as to explain why his appeals would not be frivolous and not be subject to dismissal as a result of the appeal waivers. In that same order, the State was given until February 10, 2016, to respond to Garza's supplemental submission.

Garza filed a timely supplemental brief. In it, he identifies only one issue he wishes to pursue on appeal in the underlying cases: whether the Court

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[1] The closest he has come is pointing out that, on one of his two guilty plea advisory forms, he incorrectly answered Question 19, which asked whether the plea agreement involves an appeal waiver. (Pet'r's Supp. Br. 3.) As already noted, both plea agreements contain an express appeal waiver. Garza's incorrect answer to Question 19 on one guilty plea advisory form is inconsequential because, as just noted, he has never contended that he did not appreciate or understand, in entering his pleas, that appeal waivers were part of both plea agreements.

properly exercised its discretion in imposing the sentences to which he and the State agreed in the two I.C.R. 11(f)(1)(C) plea agreements. (Pet'r's Suppl. Br. 2.) He questions whether it is appropriate for the Court to ask him to identify non-frivolous appeal issues. (Id.) In that regard, he notes that under *Beasley v. State*, 126 Idaho 356, 883 P.2d 714 (Ct. App. 1994), prejudice to the petitioner is presumed if his trial counsel failed to file an appeal at his request. (Id. at 2-3.) As discussed below, however, *Beasley* can be distinguished on the ground that, unlike Garza, Beasley did not enter into an appeal waiver. That is why the Court asked Garza to identify his prospective appeal issues and explain why they are non-frivolous and not subject to dismissal as a result of his appeal waivers. Garza's supplemental brief gives no reason to think his hoped-for appeals would not be dismissed as a result of his appeal waivers.

The State filed a timely response to Garza's supplemental brief. Its response emphasizes Garza's knowing and voluntary agreement to the appeal waivers, and argues that *Beasley* is distinguishable because it did not involve an appeal waiver. (State's Suppl. Br. 2-3.)

The cross-motions were deemed under advisement as of February 10, 2016, when the State's response was filed. They are ready for decision.

Post-conviction claims may be summarily adjudicated if "it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine

issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(c). There is no genuine factual dispute here. The parties agree on the following key facts: (i) Garza entered into I.C.R. 11(f)(1)(C) plea agreements in which he waived the right to appeal; (ii) he asked his trial counsel to file appeals, despite having received the bargained-for consecutive sentences and despite having waived his right to appeal; and (iii) because of the appeal waivers, his trial counsel declined to act on his request to file appeals. In light of the parties' agreement on these facts-and in the absence of evidence that Garza's pleas were invalid, or that the State breached the plea agreements- Garza's claim is amenable to resolution as a matter of law.

To prevail on a claim of ineffective assistance of counsel, the petitioner must satisfy a two-pronged test. *E.g., Strickland v. Washington,* 466 U.S. 668, 687 (1984). First, the petitioner must prove his counsel's performance was deficient. *Id.* "There is a strong presumption that counsel's performance fell 'within the wide range of professional assistance,'" so the petitioner must prove his "'counsel's representation fell below an objective standard of reasonableness.'" *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (198) (quoting *Strickland,* 466 U.S. at 688-89). Second, the petitioner must prove he was prejudiced by his counsel's deficient performance. *Strickland,* 466 U.S. at 687.

Generally speaking, trial counsel's failure to file an appeal at a criminal defendant's request is deficient performance that prejudices the defendant, irrespective of whether the appeal has

merit. *E.g., Beasley*, 126 Idaho at 359, 883 P.2d at 717; *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 484 (2000). As the United States Supreme Court put it in *Flores-Ortega*, "[t]he . . . denial of the entire judicial proceeding *[i.e.*, the appeal] itself, which a defendant wanted at the time and to which he had a right . . . demands a presumption of prejudice." 528 U.S. at 483 (emphasis added). Neither *Beasley* nor *Flores-Ortega*, however, involved a defendant who had waived the right to appeal, as Garza did. The question this case presents is whether the same legal framework applies when the defendant had waived the right to appeal. That question has not been resolved by the United States Supreme Court, nor has it been resolved in a published Idaho appellate decision.

That said, an unpublished decision of the Idaho Court of Appeals resolved the question against the defendant. *State v. Garcia*, 2014 WL 7013214, at *3 (Idaho Ct. App. Dec. 12, 2014). In *Garcia*, the court held that Garcia's counsel, by failing to file an appeal at Garcia's request, did not render ineffective assistance because "the plea agreement waived Garcia's right to appeal, there is no evidence that the plea agreement was breached, and the record conclusively demonstrates that Garcia's plea agreement was made knowingly, voluntarily, and intelligently." *Id.* Here, as in *Garcia*, the defendant waived his right to appeal, there is no evidence the State breached the plea agreements, and the record conclusively demonstrates the voluntariness of the defendant's pleas. Consequently, were it a published decision, *Garcia* would dictate the result here: summary dismissal of Garza's claim. But, as *Garcia* itself

recites, it is not precedential and may not be cited as authority.

In the absence of a precedential Idaho appellate decision on point, the Court thinks it prudent to examine the state of federal jurisprudence. As already noted, there is no United States Supreme Court decision on point. But nearly every federal circuit court of appeals has resolved the question this case presents.

The majority rule-adopted in eight circuits, including the Ninth Circuit, which is responsible for appeals emanating from federal courts in Idaho-is that counsel's failure to file an appeal at a criminal defendant's request is deficient performance that prejudices the defendant, even if the defendant had validly waived the right to appeal. *See Campusano v. United States*, 442 F.3d 770, 775 (2d Cir. 2006); *United States v. Poindexter*, 492 F.3d 263, 273 (4th Cir. 2007); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007); *Campbell v. United States*, 686 F.3d 353, 358 (6th Cir. 2012); *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1195-99 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262, 1266-67 (10th Cir. 2005); *Gomez-Diaz v. United States*, 433 F.3d 788, 791-94 (11th Cir. 2005).

A minority of two circuits follows the approach the Idaho Court of Appeals chose in its unpublished *Garcia* decision: that it is not ineffective assistance for trial counsel not to follow a defendant's instruction to appeal when the defendant has validly waived the right to appeal. *See United States v. Mabry*, 536 F.3d 231, 242 (3d Cir.

2008); *Nunez v. United States*, 546 F.3d 450, 456 (7th Cir. 2008). Additionally, the federal district courts within the First Circuit-which has not resolved this question itself-follow the minority rule. *See, e.g., Benjamin Maes v. United States*, 2015 WL 9216583, at *3 n. 1 (D.N.H. Dec. 16, 2015). Thus, the minority rule is being applied in three federal circuits.

The Court has reviewed these competing circuit decisions. Having done so, the Court considers the minority rule to be better reasoned. In that regard, the Court focuses on the prejudice prong of the *Strickland* test, rather than on the deficient-performance prong.[2]

When a defendant has waived his right to appeal in an enforceable plea agreement, dismissal-not consideration on the merits-is the fate that awaits any appeal the defendant files. *See, e.g., State v. Allen*, 143 Idaho 267, 270, 141 P.3d 136, 139 (Ct. App. 2006). That is because "[a] defendant's waiver of the right to appeal as a term of a plea

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[2] One might reasonably think trial counsel's failure to file an appeal at the defendant's request is deficient performance even if the defendant has waived the right to appeal, on the theory that it is ultimately the defendant's decision (not trial counsel's decision) whether to abide by the terms of the plea agreement. By failing to follow the defendant's instruction to appeal-even if that instruction is pointless, or even if it is foolhardy and in breach of the plea agreement-trial counsel usurps the defendant's authority as decision-maker. *Campbell*, 686 F.3d at 359-60 ("[I]t is a defendant's prerogative to take the stand, enter a guilty plea, or waive a jury trial, even if counsel advises against those actions. The same principle applies to the defendant's decision to pursue an appeal, even if that right has been severely limited and the outlook on the merits is bleak.") (internal citation omitted). Nevertheless, in deciding this case, the Court need not and does reach this question.

bargain is generally valid and enforceable." *Id.* Thus, while an appeal waiver does not stop the defendant from filing an appeal, it denies him a decision on the merits, as, in light of the waiver, he lacks the right to appeal. The defendant's having the "right" to appeal-indeed, the right to an "entire judicial proceeding" at the appellate level-was central to *Flores-Ortega's* holding that the defendant is presumed to have been prejudiced by his trial counsel's failure to appeal at his request. 528 U.S. at 483 ("The . . . denial of the entire judicial proceeding *[i.e.,* the appeal] itself, which a defendant wanted at the time and to which he had a right, . . . demands a presumption of prejudice."). It is unclear why a defendant who validly waived the right to appeal deserves the benefit of a counterfactual presumption that he is prejudiced by his trial counsel's failure to attempt to exercise a waived right. Such a defendant does not, in fact, lose his "right" to an "entire judicial proceeding" at the appellate level if his counsel fails to file an appeal at his request. Instead, because he waived the right to appeal, all he loses is the opportunity to see his appeal dismissed without a decision on the merits. This short-circuited appellate proceeding is not the kind of "entire judicial proceeding" whose loss demands a presumption of prejudice.

Such a defendant should, instead, be required to show prejudice.[3]

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[3] Idaho's courts take that approach in the similar context of motions for reduction of sentence under I.C.R. 35. Although a defendant has the right to file a Rule 35 motion, his trial counsel's failure to follow his instruction to do so does not presumptively prejudice him. Instead, prejudice must be shown. *See, e.g., Hassett v. State,* 127 Idaho 313, 318, 900 P.2d

In that regard, it would suffice for the defendant to show non-frivolous grounds for asking the appellate court to decide his appeal on the merits, despite the appeal waiver. Thus, if the defendant shows that there are non-frivolous grounds for contending on appeal either that (i) the appeal waiver is invalid or unenforceable, or (ii) the issues he wants to pursue on appeal are outside the waiver's scope, he shows he was prejudiced by his trial counsel's failure to file appeals at his request. *See Nunez*, 546 F.3d at 453-56; *Mabry*, 536 F.3d at 239-44. Otherwise, he has not shown prejudice and, again, should not benefit from a wooden presumption that he was prejudiced by the denial of an appellate proceeding, the right to which he had waived.

Applying this legal framework to these cases, the Court notes that the appeals Garza asked his counsel to file have not even been argued, much less shown, to be outside the scope of Garza's appeal waivers. Moreover, the appeal waivers are valid parts of plea agreements into which Garza knowingly, voluntarily, and intelligently entered, as the record of the two underlying cases makes clear. In fact, the Court has already dismissed, for lack of factual support, Garza's claim to post-conviction relief on the theory that his pleas were not voluntary. Finally, the appeal waivers are enforceable by the State, as there is no evidence of a breach of the plea agreements by the State that would result in a loss of its right to enforce them.

221, 226 (Ct. App. 1995). It would seem anomalous to presume prejudice in the failure-to-appeal context when the defendant has waived the right to appeal, yet not presume prejudice in the Rule 35 context even when the defendant has not waived the right to file a Rule 35 motion.

Garza therefore has not shown any reason to believe the appeals he asked his trial counsel to file would have been considered on the merits. It appears, instead, certain that they would have been dismissed as a result of the appeal waivers. For that reason, even assuming *arguendo* that Garza's trial counsel performed deficiently by not filing the appeals, Garza's claim still must be summarily dismissed because he has not shown any resulting prejudice.

Accordingly,

IT IS ORDERED that the State's motion for summary adjudication is granted and Garza's. motion for summary adjudication is denied. Garza's lone remaining claim-that his trial counsel rendered ineffective assistance by failing to file appeals at his request-is summarily dismissed. Judgment therefore will be entered against Garza in a separate document, as required by I.R.C.P. 54(a) and 58(a).

Dated this 11th day of February, 2016.

/s/ Jason D. Scott
Jason D. Scott
DISTRICT JUDGE

APPENDIX D

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

[filed January 22, 2015]

STATE OF IDAHO Plaintiff, vs. GILBERTO GARZA, JR., Defendant	Case No. CR-FE-2014-0009960 PLEA AGREEMENT PURSUANT TO ICR 11(f)(1)(C)

COMES NOW, Barbara A. Duggan, Deputy Prosecuting Attorney for Ada County, and Defendant Gilberto Garza Jr., on his own behalf and by and through his attorney of record, Paul Taber, and pursuant to Rule 11(f)(1)(C) of the Idaho Criminal Rules, herby submit the following plea bargain agreement to the Court for its acceptance or rejection:

1. The Defendant, Gilberto Garza Jr., shall enter a knowing, voluntary and intelligent plea of guilty to AGGRAVATED ASSAULT, FELONY in the Indictment. In CR-FE-2014-0009960. Defendant Gilberto Garza Jr. will enter an Alford Plea of Guilty. Gilberto Garza Jr. stipulates and agrees the State has substantial, strong evidence of his guilt and that a jury would find him guilty beyond a reasonable doubt. The Court shall enter the

following sentence for FELONY AGGRAVATED ASSAULT, a Judgment of Conviction with an imposed fixed term of two (2) years and an indeterminate term of three (3) years. Defendant Gilberto Garza Jr. will serve the sentence imposed in CR-FE-2014-0009960 consecutive to the sentence in CR-FE-2013-0006654. (Defendant is currently incarcerated in CR-FE-2013-0006654.) Gilberto Garza Jr. will be in the custody of the Idaho Department of Corrections. The sentence is an imposed, consecutive, prison sentence. The Court will not retain jurisdiction. The Ada County Prosecutor agrees to dismiss the Persistent Violator sentencing enhancement in CR-FE-2014-0009960 at the time of sentencing.

2. The Ada County Prosecutor's Office agrees to not file on Gilberto Garza Jr. for the Burglary and Grand Theft from Luis Garcia. It is also the State's understanding that an agent with the ATF agrees to not refer Gilberto Garza Jr., for federal prosecution for possession of ammunition on July 11, 2014 in Boise, Ada County, Idaho pursuant to 18 U.S.C. §922(g)(1) regarding the ammunition recovered from his place of residence as reflected in DR#2014-414682.

3. This ICR 11(f)(1)(C) Agreement is part of a global resolution of pending cases in Ada County which include CR-FE-2014-0009960, CR-FE-2014-0018183 and CR-FE-2014-0009959. Defendant Gilberto Garza Jr., will enter knowing, voluntary and intelligent guilty pleas in each of these cases. If Defendant Gilberto Garza Jr., fails to enter the requisite pleas of guilty in all three cases then the agreement in

each and all cases are nullified and all charges in each case will be reinstated, as well as, the Information(s) Part II, and the cases shall be set for trial(s). The Ada County Prosecutor may also file charges it agreed not to file in item 2.

Defendant Gilberto Garza Jr., will waive his Preliminary Hearing and plead guilty in District Court to Possession with Intent to Deliver Methamphetamine in CR-FE- 2014-0018183 with a separate ICR 11(f)(1)(C) agreement with one (1) year fixed and four (4) years indeterminate to be served consecutive to CR-FE-2014-0009960 and CR-FE-2013-0006654.

It is further anticipated that in CR-FE-2014-0009959 Defendant Gilberto Garza Jr., will enter pleas of guilty to amended charges of Misdemeanor Assault, Misdemeanor Carrying a Concealed Weapon (CCW) and Misdemeanor Battery.

4. The Defendant shall be ordered to provide a DNA sample. The Defendant shall be ordered to pay court costs and statutorily required fees, which may include a fee for the preparation of the Presentence Investigation Report (PSI.) Defendant Gilberto Garza Jr. may elect to remain silent and exercise his constitutional right to remain silent in the preparation of a PSI if a PSI is ordered by the court. There will be a $5,000. fine imposed as a civil penalty which will be ordered for the victim pursuant to I.C. §19-5307. The victim may address the Court via Victim Impact Statement (VIS.) The Court will enter a No Contact Order (NCO) on behalf of the victim.

5. The Defendant Gilberto Garza Jr. understands the Court is not bound to accept this binding plea bargain agreement and that if the Court should reject said agreement, the Defendant shall be allowed an opportunity by the Court to withdraw his plea of guilty and proceed to trial on the charge in the Indictment as well as the Information Part II which is or may be filed. The Defendant has reviewed discovery and conferred with learned counsel about his plea of guilty and the significant benefit provided to Defendant in the plea agreement. Defendant Garza asserts he is pleased and satisfied with his legal representation. The Defendant further understands that he has an absolute right to plead not guilty and persist in that plea, that he is presumed innocent, that he has a right to be tried by jury, and that he has the right to the assistance of counsel. Defendant further understands that he has the right to require the State to prove each and every element of the case against him beyond a reasonable doubt, that he has the right to remain silent and that the exercise of such right would not be used against him. Defendant further understands that at trial he would have the right to confront and cross-examine witnesses on his own behalf and the right to subpoena witnesses to testify. Finally, the Defendant understands that by pleading guilty he waives the above rights, including his right to trial by jury as well as any ICR 12 motions, as long as the court accepts this agreement and imposes the agreed upon terms.

6. Defendant Gilberto Garza Jr. acknowledges a

Grand Jury Transcript was ordered and stipulates to the court using the Grand Jury Transcript Testimony as additional factual bases for the entry of the plea of guilty. Defendant waives any and all challenges of the probable cause findings by the Grand Jury. Defendant acknowledges his guilt.

7. This is an ICR 11 (f)(1)(c) binding plea agreement. Defendant Gilberto Garza Jr. waives his right to appeal and waives his right to request ICR 35 relief.
8. Defendant, Gilberto Garza Jr., agrees with the language in the charging documents and the State's ability to prove him guilty beyond a reasonable doubt.
9. Defendant Gilberto Garza Jr. recognizes Perjury is a Felony Offense that carries a possible prison sentence of fourteen (14) years.
10. The parties hereto freely state that this Agreement constitutes the entire agreement between the Defendant Gilberto Garza Jr., his attorney, Paul Taber, and the Plaintiff, State of Idaho, and that no other promises, or inducements have been made, directly or indirectly, by any agent of the State of Idaho, including but not limited to the Ada County Prosecuting Attorney's Office, the Boise Police Department, the Ada County Sheriff's Office or any other governmental entity. In addition, the Defendant states that no person, including his attorney or any other individual has directly or indirectly threatened or coerced him to enter a plea of guilty or to do or refrain from doing anything in connection with any aspect of this case.
11. Should Defendant Gilberto Garza Jr. move to

withdraw his plea of guilty or should the court reinstate a plea of not guilty on his behalf, the State will use Defendant's testimony during his entry of plea of guilty and his written plea form, during the State's case at trial. Defendant waives his speedy. trial rights (Constitutionally and statutorily) in this event.

DATED, this 23 day of January, 2015

/s/ Gilberto Garza Jr. — 1/23/2015
Gilberto Garza Jr. — Date

/s/ Paul Taber — 1/23/2015
Paul Taber — Date

/s/ Barbara Duggan
Barbara Duggan

[seal]

APPENDIX E

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

[filed February 24, 2015]

STATE OF IDAHO Plaintiff, vs. GILBERTO GARZA, JR., Defendant	Case No. CR-FE-2014-0018183 PLEA AGREEMENT PURSUANT TO ICR 11(f)(1)(C)

COMES NOW, Barbara A. Duggan, Deputy Prosecuting Attorney for Ada County, and Defendant Gilberto Garza Jr., on his own behalf and by and through his attorney of record, Paul Taber, and pursuant to Rule 11 (f)(l)(C) of the Idaho Criminal Rules, herby submit the following plea bargain agreement to the Court for its acceptance or rejection:

1. The Defendant, Gilberto Garza Jr., shall enter a knowing, voluntary and intelligent plea of guilty to POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE) WITH INTENT TO DELIVER, FELONY in the Information. In CR-FE-2014-0018183. Gilberto Garza Jr. stipulates and agrees the State has substantial, strong evidence of his guilt and that a jury would find him guilty beyond a reasonable doubt. The Court shall enter the following sentence for POSSESSION

OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE) WITH INTENT TO DELIVER, FELONY a judgment of Conviction with an imposed fixed term of one (1) year and an indeterminate term of four (4) years. Defendant Gilberto Garza Jr. will serve the sentence imposed in CR-FE-2014-0018183 consecutive to the sentence in CR-FE-2013-0006654 and consecutive to CR-FE- 2014-0009960. (Defendant is currently incarcerated in CR-FE-2013-0006654.) Gilberto Garza Jr. will be in the custody of the Idaho Department of Corrections. The sentence is an imposed, consecutive, prison sentence. The Court will not retain jurisdiction. The Ada County Prosecutor agrees to refrain from filing the Persistent Violator sentencing enhancement in CR-FE-2014-0018183.

2. The Ada County Prosecutor's Office agrees to not file on Gilberto Garza Jr. for the Burglary and Grand Theft from Luis Garcia. It is also the State's understanding that an agent with the ATF agrees to not refer Gilberto Garza Jr., for federal prosecution for possession of ammunition on July 11, 2014 in Boise, Ada County, Idaho pursuant o 18 U.S.C. §922(g)(1) regarding the ammunition recovered from his place of residence as reflected in DR#2014-414682.
3. This ICR 11(f)(1)(C) Agreement is part of a global resolution of pending cases in Ada County which include CR-FE-2014-0009960, CR-FE-2014-0018183 and CR-FE-2014-0009959. Defendant Gilberto Garza Jr., will enter knowing, voluntary and intelligent

guilty pleas in each of these cases. If Defendant Gilberto Garza Jr., fails to enter the requisite pleas of guilty in all three cases then the agreement in each and all cases are nullified and all charges in each case will be reinstated, as well as, the Information(s) Part II, and the cases shall be set for trial(s). The Ada County Prosecutor may also file charges it agreed not to file in item 2.

It is further anticipated that in CR-FE-2014-0009959 Defendant Gilberto Garza Jr., will enter pleas of guilty to amended charges of Misdemeanor Assault, Misdemeanor Carrying a Concealed Weapon (CCW) and Misdemeanor Battery.

4. The Defendant shall be ordered to provide a DNA sample. The Defendant shall be ordered to pay court costs and statutorily required fees, which may include a fee for the preparation of the Presentence Investigation Report (PSI.) Defendant Gilberto Garza Jr. may elect to remain silent and exercise his constitutional right to remain silent in the preparation of a PSI if a PSI is ordered by the court.
5. The Defendant Gilberto Garza Jr. understands the Court is not bound to accept this binding plea bargain agreement and that if the Court should reject said agreement, the Defendant shall be allowed an opportunity by the Court to withdraw his plea of guilty and proceed to trial on the charge in the Information as well as the Information Part II which may be filed. The Defendant has reviewed discovery and conferred with learned counsel about his plea of guilty and the significant benefit

provided to Defendant in the plea agreement. Defendant asserts he is pleased and satisfied with his legal representation. The Defendant further understands that he has an absolute right to plead not guilty and persist in that plea, he is presumed innocent, that he has a right to be tried by jury, and that he has the right to the assistance of counsel. Defendant further understands that he has the right to require the State to prove each and every element of the case against him beyond a reasonable doubt, that he has the right to remain silent and that the exercise of such right would not be used against him. Defendant further understands that at trial he would have the right to confront and cross-examine witnesses on his own behalf and the right to subpoena witnesses to testify. Finally, the Defendant understands that by pleading guilty he waives the above rights, including his right to trial by jury as well as any ICR 12 motions, as long as the court accepts this agreement and imposes the agreed upon terms.

6. This is an ICR 11(f)(1)(c) binding plea agreement. Defendant Gilberto Garza Jr. waives his right to appeal and waives his right to request relief pursuant to ICR 35.
7. Defendant, Gilberto Garza Jr., agrees with the language in the charging documents and the State's ability to prove him guilty beyond a reasonable doubt.
8. Defendant Gilberto Garza Jr. recognizes Perjury is a Felony Offense that carries a possible prison sentence of fourteen (14) years.
9. The parties hereto freely state that this Agreement constitutes the entire agreement

between the Defendant Gilberto Garza Jr., his attorney, Paul Taber, and the Plaintiff, State of Idaho, and that no other promises, or inducements have been made, directly or indirectly, by any agent of the State of Idaho, including but not limited to the Ada County Prosecuting Attorney's Office, the Boise Police Department, the Ada County Sheriff's Office or any other governmental entity. In addition, the Defendant states that no person, including his attorney or any other individual has directly or indirectly threatened or coerced him to enter a plea of guilty or to do or refrain from doing anything in connection with any aspect of this case.

10. Should Defendant Gilberto Garza Jr. move to withdraw his plea of guilty or should the court reinstate a plea of not guilty on his behalf, the State will use Defendant's testimony during his entry of plea of guilty and his written plea form, during the State's case at trial. Defendant waives his speedy trial rights (Constitutionally and statutorily) in this event.

DATED, this 24 day of February, 2015

/s/ Gilberto Garza Jr.	2/24/2015
Gilberto Garza Jr.	Date
/s/ Paul Taber	2/24/2105
Paul Taber	Date
/s/ Barbara Duggan	2/24/2015
Barbara Duggan	Date

[seal]

APPENDIX F

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

GILBERTO GARZA, JR. Plaintiff, vs. STATE OF IDAHO, Respondent.	Case No. CV-PC-2015-10589 AFFIDAVIT OF PAUL R. TABER III

BEING FIRST DULY SWORN, your affiant hereby declares as follows:

1. My name is Paul R. Taber III.
2. I am an attorney licensed in the State of Idaho.
3. I have held a continuous license to practice law in the State of Idaho since September 24, 1992.
4. My profession is the practice of law and I have a private practice in Boise, Idaho. I also serve in the capacity of providing legal representation to clients who are conflicted the Office of the Ada County Public Defender.
5. My primary field of practice is criminal law.
6. I was the attorney of record for Gilberto Garza Jr. in CR-FE-2014-0009960, CR-FE-2014-00018183 and CR-FE-2014-0009959.
7. I am in receipt of a copy of the Court Order for Waiver of Attorney Client Privilege

concerning Petitioner Gilberto Garza's claims of ineffective assistance of counsel signed by Judge Scott on July 15, 2015 and received by me on July 20, 2015 in CV-PC-2015-10589 and CV-PC-2015-10597.

8. I have received a copy of the UPCPA Petition filed by Mr. Garza in CV-PC-2015- 10589 and CV-PC-2015-10597 wherein he makes allegations regarding my representation of him in CR-FE-2014-00018183 and CR-FE-2014-0009960.

9. Mr. Garza entered a plea of guilty in CR-FE-2014-00018183 pursuant to an ICR 11(f)(1)(c) Agreement that included the term that he waived his right to appeal.

10. Mr. Garza entered a plea of guilty in CR-FE-2014-0009960 pursuant to an ICR 11(f)(1)(c) Agreement that included the term he waived his right to appeal.

11. Mr. Garza indicated to me that he knew he agreed not to appeal his sentence(s) but he told me he wanted to appeal the sentence(s) of the court. Mr. Garza received the sentence(s) he bargained for in his ICR 11(f)(1)(c) Agreement. I did not file the appeal(s) and informed Mr. Garza that an appeal was problematic because he waived his right to appeal in his Rule 11 agreements.

Further your affiant sayeth naught.

DATED this 6 day of August, 2015

/s/ Paul R. Taber
Paul R. Taber III, Esq.

No. 17-1026

In The
Supreme Court of the United States

GILBERTO GARZA, JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Idaho

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LAWRENCE G. WASDEN
Attorney General of Idaho

PAUL R. PANTHER
Chief, Criminal Law Division

KENNETH K. JORGENSEN*
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**Counsel of Record*

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WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Did the Supreme Court of Idaho correctly hold that petitioner's forfeiture of the right to appeal was the result of his knowing and voluntary waiver, rather than his counsel's decision to not comply with petitioner's request to appeal despite the valid waiver, and therefore counsel was not presumptively ineffective?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	6
A. The Idaho Supreme Court Correctly Held That The *Flores-Ortega* Presumption Of Ineffective Assistance Of Counsel Does Not Apply Where, Under Idaho Law And Procedure, There Is No Right To Appeal	7
B. The Federal Split Over Whether The *Flores-Ortega* Presumption Applies After An Appeal Waiver Is Apparently Based On Non-Constitutional Circuit Precedent Regarding What Appeal Rights Survived The Appeal Waiver	10
C. This Idaho Case Is Unsuitable For Resolving The Federal Split	14
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

Anders v. California, 386 U.S. 738 (1967).....10, 11, 12, 16

Campbell v. United States, 686 F.3d 353 (6th Cir. 2012).....10

Campusano v. United States, 442 F.3d 770 (2d Cir. 2006).....10, 13, 16

Gomez-Diaz v. United States, 433 F.3d 788 (11th Cir. 2005).....11

McKinney v. State, 162 Idaho 286, 396 P.3d 1168 (2017).....8

Nunez v. United States, 546 F.3d 450 (7th Cir. 2008).....12, 13

Roe v. Flores-Ortega, 528 U.S. 470 (2000).....*passim*

Smith v. Robbins, 528 U.S. 259 (2000).....16

State v. McKenney, 98 Idaho 551, 568 P.2d 1213 (1977).....16

State v. Murphy, 125 Idaho 456, 872 P.2d 719 (1994).....8

State v. Taylor, 157 Idaho 369, 336 P.3d 302 (Idaho App. 2014).....8

Strickland v. Washington, 466 U.S. 668 (1984).....1, 5, 15

United States v. Acquaye, 452 F.3d 380 (5th Cir. 2006).....11

United States v. Garrett, 402 F.3d 1262 (10th Cir. 2005).....11

United States v. Lo, 839 F.3d 777 (9th Cir. 2016).....11

TABLE OF AUTHORITIES – Continued

Page

United States v. Mabry, 536 F.3d 231 (3d Cir. 2008) 12, 13

United States v. Poindexter, 492 F.3d 263 (4th Cir. 2007) 10

United States v. Razzoli, 548 Fed. Appx. 733 (2d Cir. 2013) 13

United States v. Sandoval-Lopez, 409 F.3d 1193 (9th Cir. 2005) 11

United States v. Tapp, 491 F.3d 263 (5th Cir. 2007) 11

Watson v. United States, 493 F.3d 960 (8th Cir. 2007) 11

CONSTITUTIONAL PROVISION

U.S. Const. amend. IV 15

RULE

Idaho Criminal Rule 35 2

INTRODUCTION

The Supreme Court of the State of Idaho concluded that, because he knowingly, intelligently and voluntarily waived the right to appeal, petitioner Gilberto Garza, Jr., did not enjoy a right to appeal and therefore his counsel was not ineffective for declining to follow Garza's request to file a notice of appeal. Pet. App. 10a-11a. Specifically, the Supreme Court of Idaho applied this Court's statement in *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000), that a presumption of prejudice arises when the actions of counsel deprive a defendant of an appeal "'*to which he had a right.*'" Pet. App. 10a-11a (emphasis original) (quoting *Flores-Ortega*). Although there is a split in authority among the federal courts of appeals regarding whether counsel who declines to file a requested appeal because of a prior waiver is presumed ineffective, the split turns mostly on the non-constitutional question of whether a waiver encompasses the entirety of an appeal or whether some limited right of appeal remains despite the waiver. Courts that conclude there is an appeal right that survives the waiver apply the presumption of ineffective assistance of counsel, while courts that find no appeal right post-waiver conclude that the standard *Strickland v. Washington*, 466 U.S. 668 (1984), analysis applies. Because the split is based primarily on the non-constitutional question of what appellate rights survive a waiver, the petition should be denied.

STATEMENT OF THE CASE

1. Garza pleaded guilty to aggravated assault and possession of a controlled substance with intent to deliver pursuant to plea agreements with the State of Idaho. Pet. App. 2a. As part of those plea agreements the district court bound itself to follow certain "bargained for" sentencing recommendations. Pet. App. 28a-29a. Garza also waived his right to appeal and his right to seek a reduction of his sentences under Idaho Criminal Rule 35. Pet. App. 2a-3a. The district court imposed the agreed-upon sentences. Pet. App. 29a. Garza requested his trial counsel to file a notice of appeal but, in light of the waiver, his counsel declined. Pet. App. 29a.

Garza subsequently filed petitions for post-conviction relief in the district court asserting multiple claims. Pet. App. 29a. The district court summarily dismissed all but one of these claims. Pet. App. 29a. The parties thereafter filed cross-motions in the district court for adjudication of the sole remaining claim: whether Garza's counsel was ineffective because he declined to file the requested notice of appeal. Pet. App. 30a. The district court ordered Garza to file supplemental briefing, identifying the issues he sought to pursue on appeal, "as well as to explain why his appeals would not be frivolous and not be subject to dismissal as a result of the appeal waivers." Pet. App. 31a. Garza filed supplemental briefing, stating the sole issue he would have pursued on appeal was a review of the trial court's exercise of sentencing discretion. Pet. App. 31a-32a.

The district court granted the state's motion for summary dismissal and dismissed the claim of ineffective assistance of counsel for not filing an appeal. Pet. App. 33a-39a. The district court reasoned that under Idaho law a defendant who validly waives his appeal rights is not entitled to "consideration on the merits" and that he "lacks the right to appeal." Pet. App. 36a-37a. A right to an appeal was "central" to *Flores-Ortega*'s holding that counsel who fails to file an appeal is presumed ineffective. Pet. App. 37a. The only "'right'" Garza lost was to "see his appeal dismissed without a decision on the merits." Therefore, the *Flores-Ortega* presumption did not apply. Pet. App. 37a. Rather, it was Garza's burden to show prejudice by showing "non-frivolous grounds for contending" that "the appeal waiver is invalid or unenforceable" or that there are issues "outside the waiver's scope." Pet. App. 38a. The court thereupon granted the state's motion for summary disposition because Garza did not allege there were issues beyond the scope of the waiver and Garza's claim that his pleas were involuntary had already been dismissed "for lack of factual support." Pet. App. 38a-39a.

2. Garza appealed from the summary dismissal of his post-conviction petition. Pet. App. 16a. On appeal he did not challenge the holding that his pleas, including his waivers, were valid. Pet. App. 5a. The Court of Appeals of Idaho noted that whether counsel is ineffective for "failing to file an appeal upon the defendant's request" where the defendant had waived his appeal rights was a question "currently undecided in Idaho."

Pet. App. 22a. Looking to other jurisdictions, the court noted a split in the federal appeals courts on whether the *Flores-Ortega* presumption applies in such a situation, with the majority holding that it does. Pet. App. 22a-25a. The Court of Appeals of Idaho was "persuaded by the minority approach," however, because a defendant does not have the right to countermand the waiver he entered in exchange for prosecutorial concessions. Pet. App. 25a-26a. Having entered the waiver, a defendant does not have a right to appeal and therefore the rationale underlying the *Flores-Ortega* presumption was inapplicable. Pet. App. 26a. Furthermore, "the minority approach better protects defendants" because filing the appeal would allow the state to "withdraw concessions" made in the plea agreement and would make the prosecution reluctant to make future concessions for an incomplete waiver. Pet. App. 26a-27a. In the absence of a presumption, and Garza having failed to show prejudice, the Court of Appeals of Idaho affirmed the district court. Pet. App. 27a.

3. The Supreme Court of Idaho granted discretionary review of the case and likewise affirmed the district court. Pet. App. 1a-15a. It reasoned that, in Idaho, a defendant may waive his right to appeal as part of a plea agreement, so long as the waiver is knowing, intelligent and voluntary. Pet. App. 4a-5a. To show ineffective assistance of counsel a petitioner must show deficient performance and resulting prejudice. Pet. App. 5a-6a. The court recognized the holding of *Flores-Ortega* that " 'when counsel's constitutionally deficient performance deprives a defendant of an appeal that he

otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.'" Pet. App. 6a-7a (quoting *Flores-Ortega*, 528 U.S. at 484). The court further recognized a "federal circuit split" on the issue of "whether an attorney has provided ineffective assistance of counsel" where an attorney declines to file a requested appeal because the "defendant has waived the right to appeal as part of a plea agreement." Pet. App. 6a-9a.

The Supreme Court of Idaho declined to presume Garza's counsel gave ineffective assistance. Pet. App. 10a. The court noted that such a presumption applies only where counsel's actions deprive a defendant of an appeal "'*to which [defendant] had a right.*'" Pet. App. 10a-11a (emphasis original, bracketed material added) (quoting *Flores-Ortega*, 528 U.S. at 483). "This approach" of not presuming prejudice "is consistent with other areas of Idaho law," including the filing of meritless motions, the duty to not engage in frivolous litigation, and the contractual nature of plea agreements that could be considered breached if an appeal is filed. Pet. App. 11a-14a. The court thus held that the proper standard to evaluate the decision to not file a requested appeal after a waiver was that of *Strickland v. Washington*, 466 U.S. 668 (1984) (counsel is ineffective when he offers deficient performance which prejudices the defendant). A defendant dissatisfied by counsel's decision to not file a notice of appeal could assert deficient performance and prejudice or challenge the appeal waiver in post-conviction proceedings. Pet. App. 14a-15a.

The court recognized that "there are conceivable situations where a defendant who has waived his right to appeal as part of a plea agreement may still seek to challenge his conviction or sentence, for example if he is sentenced illegally or the State breaches the plea agreement." Pet. App. 14a. Such claims, however, are "properly" asserted "in a petition for post-conviction relief or writ of habeas corpus, rather than on direct appeal." Id.

REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to review the Supreme Court of Idaho's decision in this case. The federal courts of appeals are divided regarding whether the *Flores-Ortega* presumption – that counsel who fails to file an appeal when requested is ineffective – applies where the defendant has waived the right to appeal. However, review of the rationale set forth in the cases involved in that split shows that courts that presume ineffective assistance of counsel generally afford a substantial right to appellate proceedings despite the waiver, while those that do not apply the *Flores-Ortega* presumption do not grant appellate rights absent an affirmative showing by the defendant that he retains such a right. Idaho falls into the latter camp by requiring appellants to demonstrate a right to appeal despite the waiver. Requiring a post-conviction petitioner to meet the same burden he would have to meet on appeal – the burden of showing a right to appeal – is consistent with *Flores-Ortega*.

The petition for certiorari should be denied because resolution of the issue presented turns upon the non-constitutional question of whether some right to appeal is presumed despite an appeal waiver. This Idaho state case is a particularly unsuitable vehicle through which to resolve the federal circuit conflict.

A. The Idaho Supreme Court Correctly Held That The *Flores-Ortega* Presumption Of Ineffective Assistance Of Counsel Does Not Apply Where, Under Idaho Law And Procedure, There Is No Right To Appeal.

In *Flores-Ortega* this Court reviewed application of the two-prong ineffective assistance of counsel standard consisting of deficient performance and resulting prejudice. 528 U.S. at 476-77. As to the first prong, the Court stated it has "long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable" because filing the appeal is a "purely ministerial task" that "cannot be considered a strategic decision." *Id.* at 477. It applied a presumption of prejudice in the second prong because failure to follow instructions to file deprives the defendant of "more than a *fair* judicial proceeding"; it deprives him of "the appellate proceeding altogether." *Id.* at 483 (emphasis original). The presumption of prejudice relies on the "critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." *Id.* at 484.

The Supreme Court of Idaho's application of these standards in light of Idaho law and procedure regarding appeals and appeal waivers practically compels the outcome it reached. In Idaho, a knowing, intelligent, and voluntary waiver of the right to appeal made as part of a plea agreement is valid and enforceable. Pet. App. 4a-5a. Any appeal attempted in the face of a valid waiver is subject to summary dismissal. *McKinney v. State*, 162 Idaho 286, ___, 396 P.3d 1168, 1179 (2017); *see also State v. Murphy*, 125 Idaho 456, 872 P.2d 719 (1994). Such a dismissal generally will occur prior to briefing, but can happen any time the waiver is brought to the court's attention. *See State v. Taylor*, 157 Idaho 369, 370-72, 336 P.3d 302, 303-05 (Idaho App. 2014). Upon being made aware that an appellant has "waived the right to appeal the only issue(s) that the defendant seeks to raise on appeal" the Supreme Court of Idaho will "issue an order conditionally dismissing the appeal." *McKinney*, 162 Idaho at ___, 396 P.3d at 1178. The appellant is then given a chance to show "good cause why the appeal should not be dismissed." *Id.* If the appellant does not show good cause, the court "will dismiss the appeal." *Id.* Thus, if the defendant has entered an appeal waiver as part of the plea agreement, he may only pursue an appeal after demonstrating to the Supreme Court of Idaho that he or she has a right to appeal.

Under the Idaho Supreme Court's ruling, Garza had to make the same showing in post-conviction he would have been required to make to avoid dismissal of his direct appeal: That an appeal right survived the

waiver. This does not conflict with *Flores-Ortega*. In this post-conviction case Garza did not show that, had counsel filed the requested appeal, he could have met his burden of showing a right to the appeal. Garza did not claim that any appellate issues were beyond the scope of his appeal waiver, and did not challenge on appeal the post-conviction court's determination that the waiver was legally binding. Pet. App. 5a. Under Idaho law and procedure, outlined above, any appeal filed by his counsel would have been summarily dismissed without consideration of any merits of any claims because Garza could not have established any right to appeal in the face of his waiver. Pet. App. 9a-11a.

The lack of an appeal right is key here. The presumption of deficient performance and prejudice from failure to file a requested appeal articulated in *Flores-Ortega* are predicated on a right to appeal. *See, e.g.*, 528 U.S. at 484 ("counsel's deficient performance must actually cause the forfeiture of the defendant's appeal"). Under Idaho law, because of his knowing, intelligent and voluntary waiver, Garza had no state-law right to appeal. Pet. App. 10a-11a. The Supreme Court of Idaho's decision that the *Flores-Ortega* presumption did not apply because Garza had no right to an appeal was simply a straightforward application of state law to the question of whether Garza had a right to appeal that was forfeited by counsel. Granting certiorari in this case to resolve the federal circuit split is not appropriate because the question of whether Garza had a right to appeal is a question of state law.

B. The Federal Split Over Whether The *Flores-Ortega* Presumption Applies After An Appeal Waiver Is Apparently Based On Non-Constitutional Circuit Precedent Regarding What Appeal Rights Survived The Appeal Waiver.

The federal circuit courts that have applied the *Flores-Ortega* presumption of ineffective assistance where counsel does not file a requested appeal after an appeal waiver have, with the exception of the Ninth Circuit, done so on the basis that the defendant had a right to at least limited appellate proceedings despite the waiver, which right counsel forfeited. In at least three circuits that have held the presumption applies, a defendant who has waived his appeal still has the appellate right to proceed through the briefing stage. *Campusano v. United States*, 442 F.3d 770, 772-75 (2d Cir. 2006) (*Anders* brief[1] required because there are "exceptions to the presumptive enforceability of a waiver"); *United States v. Poindexter*, 492 F.3d 263, 270-72 (4th Cir. 2007) (a "typical" post-waiver appeal involves filing of an *Anders* brief or, if a merits brief is filed, the government filing a motion to dismiss); *Campbell v. United States*, 686 F.3d 353, 357-59 (6th Cir. 2012) ("even the broadest waiver does not absolutely foreclose some degree of appellate review," generally under the *Anders* framework).

Two circuits that have applied the presumption have done so because, under circuit precedent, the right to appeal survives the appeal waiver unless the

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[1] *Anders v. California*, 386 U.S. 738 (1967).

government proves, by dispositive motion, that the waiver is enforceable and applicable. *Watson v. United States*, 493 F.3d 960, 963-64 (8th Cir. 2007); *United States v. Garrett*, 402 F.3d 1262, 1265-67 (10th Cir. 2005). One has held that "[t]he reasoning of *Flores-Ortega* applies with equal force where, as here, the defendant has waived many, but not all, of his appellate rights." *Gomez-Diaz v. United States*, 433 F.3d 788, 793-94 (11th Cir. 2005).

Only two circuits have concluded that the *Flores-Ortega* presumption applies without analyzing what appellate procedure is employed where the defendant has waived appeal rights. The Fifth Circuit adopted the holdings of other circuit courts without articulating any particular ground for concluding the *Flores-Ortega* presumption applied where the defendant waived appeal rights. *United States v. Tapp*, 491 F.3d 263 (5th Cir. 2007). However, in the Fifth Circuit, like the Second, Fourth and Sixth, a defendant who has waived his appeal rights is entitled to have his counsel file an *Anders* brief. *United States v. Acquaye*, 452 F.3d 380, 381-82 (5th Cir. 2006). Likewise, the Ninth Circuit concluded *Flores-Ortega* alone "required" it "to conclude that it was deficient performance not to appeal and that [defendant] was prejudiced," even though this result was "contrary to common sense" and "troubling." *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1196-97 (9th Cir. 2005). The Ninth Circuit, however, has "carved out a number of exceptions to the rule that a defendant can waive the right to appeal various claims." *United States v. Lo*, 839 F.3d 777, 785 (9th Cir.

2016). Thus, although these circuits did not specifically articulate what appeal rights were protected by application of the presumption, circuit precedent makes clear that such rights exist.

The circuits in the "majority" have precedent showing that an appeal waiver is not presumed absolute, and the defendant is therefore entitled to some degree of appellate review before the waiver will be enforced. Applying the presumption under such circumstances is entirely consistent with the *Flores-Ortega* rationale.

In contrast, the two federal circuits that have declined to apply the presumption of ineffective assistance of counsel have concluded that the appeal waiver is deemed conclusive of the appeal. In *Nunez v. United States*, 546 F.3d 450, 452-56 (7th Cir. 2008), the Seventh Circuit stated that the waivers actually "waiv[ed] the right to appeal" and any attempt to appeal "would have been dismissed in short order." A post-waiver defendant is not entitled to "the *Anders* procedure" because that procedure "is required only when there is a right to appeal (and thus a right to have counsel act as an advocate *on* appeal)." *Id.* at 455 (emphasis original). Likewise, in *United States v. Mabry*, 536 F.3d 231, 241-44 (3d Cir. 2008), the Third Circuit reasoned that there is no presumption of ineffective assistance because the "entitlement" of an appeal "disappears" with a valid waiver, and therefore "the ineffectiveness of counsel in not pursuing a waived appeal is less than clear." The court in *Mabry* concluded that the cases applying the *Flores-Ortega* presumption post-waiver

were not "well-reasoned" because they "disregard" the "validity of the waiver" and instead "seem to hold" that such waivers are "automatically invalid." 536 F.3d at 242. The *Mabry* court adopted the "proper focus" as set forth in *Nunez*, *supra*, of "giving effect to the waiver." *Id.*

All told, the circuits that have applied the *Flores-Ortega* presumption of ineffective assistance of counsel where counsel – because of an appeal waiver – does not follow a defendant's request to appeal have apparently done so based on circuit precedent holding that the defendant enjoys a limited right to pursue the appeal despite the waiver, either through briefing or until the government makes and wins a dispositive motion.[2] In contrast, the two circuits that do not apply the presumption consider the waiver valid unless the defendant meets a burden of showing a right to appeal, and therefore require the defendant in post-conviction to make the same showing of a right to appeal he would have had to have made on the appeal itself. In short, it

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[2] Indeed, the Second Circuit did not apply the presumption where it was clear under circuit precedent that the defendant enjoyed no appellate rights. In *United States v. Razzoli*, 548 Fed. Appx. 733, 736 (2d Cir. 2013) (unpublished), decided after *Campusano*, the Second Circuit held that "failing to file an interlocutory appeal from the district court's denial of [Razzoli's] Rule 33 motion" was not ineffective assistance of counsel because "there would have been no appellate jurisdiction over an interlocutory appeal of that order, and thus Razzoli cannot demonstrate prejudice from counsel's failure to file such an appeal." That the presumption does not apply sometimes even in "majority rule" circuits further shows that the split is not as clear or as well-defined as Garza contends.

appears the federal courts of appeals applying the *Flores-Ortega* presumption post-waiver (with one exception) do so under circuit precedent granting some limited right to appeal (rebuttable or otherwise) despite the waiver, while those that reject the application of the *Flores-Ortega* presumption do so where no appeal rights are presumed to survive the waiver.

Because the split in application of the *Flores-Ortega* presumption post-waiver apparently turns on the non-constitutional question of whether a limited right to appellate proceedings survives a waiver, there is no need for this Court to review the constitutional question Garza presents.

C. This Idaho Case Is Unsuitable For Resolving The Federal Split.

As shown above, under Idaho law the appeal waiver controls unless the appellant can show cause why the appeal should proceed. Therefore, under Idaho law, unless there are grounds for getting around or through the waiver there is no right to post-waiver appeal proceedings. Simply stated, by declining to file a notice of appeal counsel cannot forfeit proceedings to which a defendant is not entitled. Counsel's action, under Idaho law, did not "cause the forfeiture of [Garza's] appeal" and has not "deprived him of anything." *Flores-Ortega*, 528 U.S. at 484.[3]

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[3] That does not mean a defendant such as Garza cannot assert post-plea, post-waiver claims. He received a full opportunity in the state post-conviction court to demonstrate the existence of

Garza asserts the Supreme Court of Idaho's decision is "wrong and troubling" because an appeal waiver will only "substantially limit" the right to appeal. Pet. 3. This argument fails to recognize that, under Idaho law and the facts of this case, Garza's appeal rights were not merely substantially limited, but completely waived. *See* Pet. App. 11a ("Once a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal."), 38a (district court holding that Garza must show either that the "waiver is invalid or unenforceable" or that he can assert an issue "outside the waiver's scope"). Requiring a post-conviction petitioner to show that counsel was ineffective under the *Strickland* standard when counsel concluded that the waiver barred any appeal is no more "wrong and troubling" than requiring a petitioner to show that counsel was ineffective under the *Strickland* standard when counsel concluded that the defendant's Fourth Amendment rights were not violated and therefore did not file a motion to suppress.

Garza contends, citing Second Circuit precedent, that "'important constitutional rights require some exceptions to the presumption of enforceability of [an appeal] waiver,'" including "whether the waiver was made knowingly, voluntarily and competently, whether the government breached the plea agreement, whether

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evidence supporting his claim that his plea was not knowing and voluntary. *See* Pet. App. 38a. And he could have asserted that he was "sentenced illegally or the State breache[d] the plea agreement . . . in a petition for post-conviction relief." Pet. App. 14a. Garza chose not to.

the sentence was imposed based upon constitutionally impermissible factors, and other challenges related to the legality of the sentence." Pet. 10 (brackets original) (quoting *Campusano*, 442 F.3d at 774). As discussed in subsection B, *supra*, however, whether a circuit employs "exceptions to the presumption of enforceability" of an appeal waiver appears to the be the driving factor behind the federal split, with courts that have such exceptions applying the *Flores-Ortega* presumption while those that do not have such exceptions finding the *Flores-Ortega* presumption inapplicable. Idaho does not have exceptions to the presumption of enforceability of the waiver (rather, the waiver is presumed enforceable unless the defendant demonstrates otherwise), and Garza has made no argument that this Court should constitutionally require it to adopt exceptions to the presumption of enforceability.[4]

The *Flores-Ortega* presumption of deficient performance and prejudice is premised upon (1) the act of filing an appeal being merely ministerial and (2) the failure to file an appeal depriving the defendant of an appeal proceeding to which he had a right. The Idaho Supreme Court's holding that the *Flores-Ortega*

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[4] Garza also seeks to impose the *Anders* briefing procedure on Idaho, Pet. 11-12, even though that procedure is not constitutionally required, *Smith v. Robbins*, 528 U.S. 259, 276 (2000) ("we hold that the *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals"), and has been specifically rejected in Idaho, *State v. McKenney*, 98 Idaho 551, 552-53, 568 P.2d 1213, 1214-15 (1977) (disallowing withdrawal of appointed counsel and obliging appellate counsel to brief the merits of the strongest issue possible).

presumption does not apply in this case because Garza enjoyed no appellate rights under Idaho law does not merit this Court's further review.

CONCLUSION

The State of Idaho respectfully requests this Court to deny Garza's Petition for Writ of Certiorari.

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No. 17-1026

IN THE
Supreme Court of the United States

GILBERTO GARZA JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

REPLY FOR PETITIONER

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TABLE OF CONTENTS

Table Of Authorities ii
Reply For Petitioner 1
Conclusion 10

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738 (1967) 9
Campusano v. United States,
442 F.3d 770 (2d Cir. 2006) 9
Jones v. United States,
167 F.3d 1142 (7th Cir. 1999) 3-4
McCoy v. Louisiana,
No. 16-8255 (U.S. May 14, 2018) 9
McKinney v. State, 396 P.3d 1168 (Idaho 2017) 2
Nunez v. United States,
546 F.3d 450 (7th Cir. 2008) 3
Roe v. Flores-Ortega, 528 U.S. 470 (2000) 1, 6, 7, 10
State v. Allen,
141 P.3d 1136 (Idaho Ct. App. 2006) 5
State v. Contreras, No. 40732,
2013 WL 6869867 (Idaho Ct. App. Dec. 31, 2013) 9
State v. Cope, 129 P.3d 1241 (Idaho 2006) 4, 5
State v. Faulkner, No. 40729,
2013 WL 5486743 (Idaho Ct. App. Oct. 2, 2013) 9
State v. Hansen, 321 P.3d 719 (Idaho 2014) 6
State v. Huerta, No. 37871,
2011 WL 11037654 (Idaho Ct. App. June 6, 2011) 9
State v. Holdaway,
943 P.2d 72 (Idaho Ct. App. 1997) 6
State v. McKenney, 568 P.2d 1213 (Idaho 1977) 9
State v. Murphy, 872 P.2d 719 (Idaho 1994) 4
State v. Rodriguez, No. 45233,
2018 WL 700168 (Idaho Ct. App. Feb. 5, 2018) 6
State v. Straub, 292 P.3d 273 (Idaho 2013) 6
State v. Taylor,
336 P.3d 302 (Idaho Ct. App. 2014) 5, 8, 9
Strickland v. Washington, 466 U.S. 668 (1984) 10
United States v. Garrett,
402 F.3d 1262 (10th Cir. 2005) 8
United States v. Goodson,
544 F.3d 529 (3d Cir. 2008) 6

United States v. Hahn,
359 F.3d 1315 (10th Cir. 2004) 8
United States v. Khattak,
273 F.3d 557 (3d Cir. 2001) 4
United States v. Kieffer,
794 F.3d 850 (7th Cir. 2015) 6
United States v. Mason,
343 F.3d 893 (7th Cir. 2003) 8
United States v. Razzoli,
548 F. App'x 733 (2d Cir. 2013) 2
United States v. Williams,
555 F. App'x 127 (3d Cir. 2014) 8

Other Authorities

3d Cir. R. 27.4 & I.O.P 10.6 7
10th Cir. R. 27.3(A)(1)(d) 8
D.C. Cir. R. 27(g) 7
D.C. Cir. Handbook of Practice &
Internal Procedures 7
Fed. R. App. P. 11(g) 7
Fed. R. App. P. 27 7
Idaho App. R. 32(a) 7
Brief of United States in Opposition,
Nunez v. United States, 554 U.S. 911 (2008)
(No. 07-818), 2008 WL 2050805 4

REPLY FOR PETITIONER

Respondent does not dispute that, after pleading guilty, Petitioner directed his lawyer to file a notice of appeal and his lawyer unilaterally forewent an appeal because the plea contained an appeal waiver. Respondent also does not dispute that whether the presumption of prejudice in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), applies in these circumstances is dispositive of Petitioner's claim.

Respondent does not deny the existence of a deep conflict among lower courts on this issue, but says they "apparently" just differ on the question of whether "a defendant ha[s] a right to at least limited appellate proceedings despite the waiver." BIO at 10, 13. Respondent's fanciful account is not how any of the courts below, any other court, any prior BIOs, or even Respondent before now understood the issue dividing the lower courts. It is also demonstrably false. The Idaho Supreme Court and all circuits have explicitly recognized that a defendant may directly appeal the validity or enforceability of an appeal waiver, the scope of the waiver (and any issue outside its scope), and the legality of the sentence imposed.

1. Respondent's invented account of the split conflicts with how everyone else sees it. The Idaho Supreme Court, for instance, explicitly understood the conflict to turn on "differing interpretations of the United State Supreme Court's decision in *Flores-Ortega*." Pet. App. 6a. It noted that "the United States Supreme Court" had not yet resolved the issue, *id.*—an observation that makes no sense under Respondent's reading. And it adopted the minority interpretation of this Court's decision: "[W]e conclude that *Flores-Ortega* does not require counsel be presumed

ineffective for failing to appeal at the client's direction in situations where there has been a waiver of the right to appeal." Pet. App. 10a. In reaching that conclusion, the court did not cite a single decision premised upon Idaho law or appellate process.[1]

Before the Idaho Supreme Court, Respondent understood the same, stating, "The United States Supreme Court has not explicitly addressed the narrow question at issue here." Appellee Br. at 8. It explicitly set forth the conflict among the federal circuits—characterizing it as a choice between the "majority rule" and the "minority rule"—and argued straightforwardly that "the minority rule is better reasoned" because it "comports with both the *Strickland* two-prong test, and *Flores-Ortega*." Appellee Br. at 11–12, 17. And Respondent specifically acknowledged that in Idaho, an appeal waiver does not prevent an appeal "that the waiver was invalid or unenforceable," that "the state breached the plea agreement," or that "the claimed issues on appeal were outside the waiver's scope." *Id.* at 11–12; *see infra* at 3-6 (explaining that this is, in fact, the case).

Not a single one of the circuits or state high courts cited in the petition or in the BIO have conceived of the issue in the manner Respondent advances. *See* Pet. at 8–9.[2] Indeed, prior BIOs on this issue have

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[1] The only state court decision cited before making this choice was *McKinney v. State*, 396 P.3d 1168, 1171–72 (Idaho 2017), which itself "interpreted *Flores-Ortega*." Pet. App. 10a.

[2] In a footnote, Respondent contends that the conflict "is not as clear" as Petitioner and courts have described, citing *United States v. Razzoli*, 548 F. App'x 733, 736 (2d Cir. 2013). BIO at 13. That unpublished decision concerned an alleged failure to file a jurisdictionally barred interlocutory appeal. There had not even

conceded the intractable conflict on the question presented, but advised the Court that the proper vehicle would involve an appeal waiver without an additional waiver of collateral review. *See* Pet. at 13-14. That's th.s case.

2. Respondent's account of the split is also demonstrably false. Respondent is correct that the majority of lower courts, which interpret *Flores-Ortega* to require a presumption of prejudice independent of an appeal waiver, have recognized that a defendant who signs a waiver may challenge the validity, enforceability, and scope of the waiver. Pet. at 8–9, 10; BIO at 10. Respondent argues, however, that the minority of courts adopting the contrary position (which includes the Third Circuit, Seventh Circuit, and Idaho) have simply concluded that no "limited right of appeal remains despite the waiver" and "the appeal waiver is deemed conclusive of the appeal." BIO at 1, 12. That is not true.

Each of the Seventh Circuit, Third Circuit, and Idaho has explicitly recognized that these issues necessarily survive an appeal waiver. In rejecting the majority interpretation of *Flores-Ortega*, for instance, the Seventh Circuit specifically acknowledged that "waivers of appeal are not airtight" and a defendant has "a right to legal assistance" to challenge whether "the plea was involuntary," issues outside of the scope of the waiver, or "a sentence higher than the statutory maximum." *Nunez v. United States*, 546 F.3d 450, 454 (7th Cir. 2008); *see also Jones v. United States*, 167

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been a conviction to appeal at the time, let alone an appeal waiver; there was no client instruction to file an appeal; and the court never even cited or discussed *Flores-Ortega*.

F.3d 1142, 1144 (7th Cir. 1999) ("A waiver of the right to appeal does not completely foreclose review . . . [T]he right to appeal survives where the agreement is involuntary, or the trial court relied on a constitutionally impermissible factor (such as race), or . . . the sentence exceeded the statutory maximum.").[3] Similarly, the Third Circuit not only recognizes that a defendant may challenge the validity of his waiver on direct appeal, but has "decline[d] to adopt a blanket rule prohibiting all review" even for "otherwise valid waivers." *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001).

Like all these jurisdictions, Idaho courts uniformly recognize that a defendant whose plea contains an appeal waiver may contest the validity or enforceability of the waiver on direct appeal. This includes, for instance, the following issues:

- Whether the defendant "entered into his plea agreement voluntarily, knowingly, and intelligently." *State v. Cope*, 129 P.3d 1241, 1246 (Idaho 2006).[4]

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[3] Prior to the decision on remand in *Nunez*, the U.S. Solicitor General acknowledged the conflict over the meaning of *Flores-Ortega* (without Respondent's fanciful gloss), and recommended against plenary review because the petitioner's plea agreement, unlike the one here, included a waiver of collateral review. Brief of United States in Opposition at 13-14, *Nunez v. United States*, 554 U.S. 911 (2008) (No. 07-818), 2008 WL 2050805.

[4] *See also, e.g., State v. Murphy*, 872 P.2d 719, 720 (Idaho 1994) (reviewing on direct appeal whether waiver was "was made voluntarily, knowingly and intelligently"); *infra* at 9 n. 12 (citing additional cases acknowledging these issues are available).

- "[W]hether the State breached the plea agreement which would allow the plea to be withdrawn." *Id.* at 1248-49; *see also id.* ("'A defendant is constitutionally entitled to relief when the State breaches a promise made to him in return for a plea of guilty.'" (citation omitted)).[5]
- Whether statements made by the district court at the plea hearing or sentencing "overr[o]de any provision in the plea agreement waiving the right to appeal." *Id.* at 1247–48.[6]

In addition, even where a defendant does not contest the validity or enforceability of his appeal waiver, he can appeal the scope of the waiver and is, of course, free to raise any issues outside its scope. *See State v. Taylor*, 336 P.3d 302, 305 (Idaho Ct. App. 2014) (collecting Idaho cases which "illustrate [that] the party against whom waiver is asserted may contest the . . . scope of the waiver" which may not "encompass all of the issues raised by the appellant"). For example, Idaho defendants have directly appealed whether

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[5] *See also, e.g., State v. Allen*, 141 P.3d 1136, 1139 (Idaho Ct. App. 2006) (recognizing that where the State breaches a plea agreement it "would not be entitled to enforce its terms [against the defendant], including the appeal waiver. . . . Consequently, the question of the enforceability of the appeal waiver goes hand in hand with the question whether the State breached the plea agreement").

[6] As noted in the petition, Petitioner's judge specifically advised him at sentencing and in his judgments that he had a right to a counseled direct appeal. Pet. at 4.

their sentences,[7] other penalties such as restitution,[8] and post-judgment motions[9] are outside the scope of the waiver and succeeded in obtaining relief. Moreover, appeal waivers are not self-executing—where the State does not assert its rights under the waiver, the defendant may argue the full universe of issues on appeal.[10]

The question presented is whether an attorney can betray his client's instruction to preserve a counseled direct appeal on these issues and send him to post-conviction where he will, in all likelihood, be on his own. *See Flores-Ortega*, 528 U.S. at 486 ("[I]t is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have

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[7] *State v. Hansen*, 321 P.3d 719, 725 (Idaho 2014) (observing that the scope of a plea agreement "'is a question of law over which we may exercise free review'" and reviewing whether appeal waiver encompassed defendant's sentence (citation omitted)).

[8] *State v. Straub*, 292 P.3d 273, 276-77 (Idaho 2013) (observing that defendant "does not appeal the waiver itself, but rather the scope of that waiver" and holding that restitution order was outside scope of appeal waiver).

[9] *State v. Holdaway*, 943 P.2d 72, 74 (Idaho Ct. App. 1997) (appeal of post-judgment motion outside scope of waiver and thus "we do not find his appeal barred by the waiver in his plea agreement").

[10] *State v. Rodriguez*, No. 45233, 2018 WL 700168, at *1 n.1 (Idaho Ct. App. Feb. 5, 2018) (resolving merits of issue on direct appeal because the State did not assert plea waiver); *Hansen*, 321 P.3d at 725 ("'Plea agreements are essentially bilateral contracts between the prosecutor and the defendant.'" (citation omitted)); *see also e.g.*, *United States v. Goodson*, 544 F.3d 529, 533-37 (3d Cir. 2008) (An appellate waiver has "no bearing on an appeal if the government does not invoke its terms."); *United States v. Kieffer*, 794 F.3d 850, 852 (7th Cir. 2015) (same).

had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal.").

3. Respondent makes much of the fact that Idaho appellate courts (like the federal circuits) have a process through which issues may be dealt with summarily, by motion, instead of full briefing. BIO at 8–11. According to Respondent, the availability and use of such procedures is somehow also connected to the differing interpretations of *Flores-Ortega*. *Id.* This is a distraction.

The Federal Rules of Appellate Procedure provide parties with the option of filing dispositive motions. *See* Fed. R. App. P. 27, 11(g). Several circuits have adopted local rules providing specific procedures for dispositive motions. *E.g.*, D.C. Cir. R. 27(g) & D.C. Cir. Handbook of Practice & Internal Procedures at 35–36 (procedures for seeking summary disposition); 3d Cir. R. 27.4 & I.O.P 10.6 (same). Idaho appellate courts have an analogous rule, which allows a party to file a motion to dismiss an appeal. *See* Idaho App. R. 32(a).

Whether a court of appeals offers an avenue for an appellate proceeding to take place summarily by motion or proceeds by briefing is beside the point. In either case, an attorney's refusal to file an appeal at his client's direction deprives the client "of the appellate proceeding altogether" and the presumption of prejudice is warranted. *Flores-Ortega*, 528 U.S. at 483.

Accordingly, this has nothing to do with the circuit split. As Respondent acknowledges, despite having summary procedures available, a majority of circuits have held that the *Flores-Ortega* presumption applies.

BIO at 10-12. Indeed, The Tenth Circuit, sitting *en banc*, set forth a specific intra-circuit procedure for summarily dismissing appeals with valid waivers, *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004), yet presumes prejudice when counsel refuses to file an appeal based on a waiver, *United States v. Garrett*, 402 F.3d 1262, 1266 (10th Cir. 2005); *see also* 10th Cir. R. 27.3(A)(1)(d) (expressly providing that an appeal waiver may be a basis for summary disposition). And in the Third and Seventh Circuits, which decline to presume prejudice under *Flores-Ortega*, enforcement of an appeal waiver generally occurs after briefing, not dispositive motion.[11]

Respondent's suggestion that Idaho courts always resolve appeal waivers via summary dismissal on motion, BIO at 8–9, is incorrect. All of the decisions cited in Part 2 above were decided on direct appeal after full briefing. *See supra* at 3-6 & nn.3-10. Indeed, Idaho courts have explicitly recognized that in instances where the "scope and validity of the waiver" is at issue "resolution of the waiver issue by an early motion, rather than through the normal appellate process, may be inappropriate." *Taylor*, 336 P.3d at

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[11] *United States v. Mason*, 343 F.3d 893, 894 (7th Cir. 2003) ("Ordinarily the government urges waiver of appeal after the defendant has filed either a merits brief or an *Anders* brief."); *United States v. Williams*, 555 F. App'x 127, 127-28 (3d Cir. 2014) ("Typically, . . . the defendant, if he appeals, raises, in his opening brief, the reason or reasons why he believes the sentence that was imposed or the conviction itself should be set aside. And, typically, if there has been an appellate waiver, the government, in its responsive brief, will invoke that waiver, arguing why it should be enforced and, failing that, why the reason or reasons the defendant has raised for invalidating the sentence or the conviction are without merit.").

305.[12] Respondent itself argued that the application of appeal waivers can be resolved by motion or briefing. *Id.*

4. This Court recently reaffirmed that the decision to "forgo an appeal" is one of those critical steps "reserved for the client." *McCoy v. Louisiana*, No. 16-8255, slip op. at 6 (U.S. May 14, 2018); *see also generally* Amicus Br. of Yale Ethics Bureau. An attorney should not be able to veto a client who has made that decision, costing the client his right to a counseled direct appeal proceeding.[13]

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[12] Accordingly, when Idaho courts dismiss such appeals upon motion, it is generally (if not always) because the defendant "does not challenge the validity of the waiver provision in the plea agreement nor contend that the State in any way violated the plea agreement, nor does he maintain that the plea agreement was not voluntary, knowing, and intelligent." *State v. Huerta*, No. 37871, 2011 WL 11037654, at *1 (Idaho Ct. App. June 6, 2011); *State v. Contreras*, No. 40732, 2013 WL 6869867, at *1 (Idaho Ct. App. Dec. 31, 2013) (same); *State v. Faulkner*, No. 40729, 2013 WL 5486743, at *1 (Idaho Ct. App. Oct. 2, 2013) (same).

[13] As set forth in the petition, in *Anders v. California*, 386 U.S. 738 (1967), this Court established a specific procedure for an attorney to follow in the event that he or she believes there is no non-frivolous ground for appeal. Pet. at 11-12. The Idaho Supreme Court has recognized that *Anders* presents only the "minimal constitutional safeguards" and has adopted even more rigorous protection for criminal defendants, which prevents appellate counsel from withdrawing and requires a merits brief. *State v. McKenney*, 568 P.2d 1213, 1214-15 (Idaho 1977). No part of Petitioner's argument "seeks to impose" *Anders*' less stringent procedure on Idaho. BIO at 16 n.4. The point is that an attorney's refusal to appeal despite his client's direction undermines even the limited constitutional safeguards set forth in *Anders*. *See Campusano v. United States*, 442 F.3d 770, 774–77 & n.4 (2d Cir. 2006) (Sotomayor, J.).

State courts are routinely called upon to review attorney conduct under *Strickland v. Washington*, 466 U.S. 668 (1984), and, accordingly, this Court's decisions defining *Strickland* have frequently arisen out of state court proceedings, including *Flores-Ortega* and *Strickland* themselves. *See Flores-Ortega*, 528 U.S. at 473-74; *Strickland*, 466 U.S. at 671-75. The present conflict has created "needless confusion" over the obligations of counsel when instructed to file an appeal, and that confusion is particularly acute for lawyers in Idaho, who are simultaneously subject to two different rules. *See* Amicus Br. of Yale Ethics Bureau at 16–18; Amicus Br. of Idaho Association of Criminal Defense Lawyers at 8–10. Given the ubiquity of appeal waivers in modern plea agreements, *see* Amicus Br. of Idaho Association of Criminal Defense Lawyers at 4, the question presented recurs frequently and warrants this Court's attention.

CONCLUSION

For the foregoing reasons and those in the petition, certiorari should be granted.

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PETITION FOR WRIT OF CERTIORARI TO
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BRIEF OF *AMICUS CURIAE*
THE ETHICS BUREAU AT YALE
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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CONSENT TO FILE AS *AMICUS CURIAE* 1

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Criminal Defendants Have a Right to Counsel Who Will File a Notice of Appeal on Their Behalf 4

A. Fundamental Principles of Constitutional Law, Legal Ethics, and Agency Law Vest the Final Decision to Appeal in the Client 5

B. Counsel Are Required To File a Notice of Appeal Even When They Fail To Identify Any Appealable Issues 8

II. This Court Should Grant Certiorari To Preserve the Role of Courts as the Final Arbiter of Appeals 12

III. The Decision Below Creates Needless Confusion and Uncertainty for Criminal Defense Lawyers 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Anders v. California,
386 U.S. 738 (1966) ..... *passim*

Blackledge v. Perry,
417 U.S. 21 (1974) 10

C.I.R. v. Banks,
543 U.S. 426 (2005) 7

Douglas v. California,
372 U.S. 353 (1963) 6, 14

Evitts v. Lucey,
469 U.S. 387 (1985) 13, 14, 16

Faretta v. California
422 U.S. 806 (1975) 7

Garza v. State,
405 P.3d 576 (Idaho 2017) 17

Griffin v. Illinois,
351 U.S. 12 (1956) 16

Holland v. Florida,
560 U.S. 631 (2010) 6

Lafler v. Cooper,
566 U.S. 156 (2012) 16

Lane v. Brown,
372 U.S. 477 (1963) 3, 12

Maples v. Thomas,
565 U.S. 266 (2012) 6

McCoy v. Court of Appeals of Wisconsin, Dist. 1,
486 U.S. 429 (1988) 8, 10, 11, 14

Menna v. New York,
423 U.S. 61 (1975) 10

Missouri v. Frye,
566 U.S. 134 (2012) 15

Nix v. Whiteside,
475 U.S. 157 (1986) 6

Offutt v. United States,
348 U.S. 11 (1954) 15

Penson v. Ohio,
488 U.S. 75 (1988) 10, 14

Rodriquez v. United States,
395 U.S. 327 (1969) 3, 5

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 4, 5, 8, 10

Smith v. Robbins,
528 U.S. 259 (2000) 11

Suggs v. United States,
391 F.2d 971 (D.C. Cir. 1968) 13

United States v. Marin,
961 F.2d 493 (4th Cir. 1992) 10-11

United States v. Sandoval-Lopez,
409 F.3d 1193 (9th Cir. 2005) 17

Wheat v. United States,
486 U.S. 153 (1988) 15

CONSTITUTIONAL PROVISION

U.S. Const. amend. VI ..... *passim*

RULES

Model Rules of Prof'l Conduct pmbl.
(Am. Bar Ass'n 1983)..... 13

Model Rules of Prof'l Conduct r. 1.2(a)
(Am. Bar Ass'n 1983)..... 8

Model Rules of Prof'l Conduct r. 1.7 cmt. 1 (Am. Bar Ass'n 1983) 13

Model Rules of Prof'l Conduct r. 3.1 (Am. Bar Ass'n 1983) 9

OTHER AUTHORITIES

ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-5.2(a)(v) (3d ed. 1993) 7

ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.2 cmt (3d ed. 1993) 6, 11

ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.2(a) (3d ed. 1993) 6

ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.2(b) (3d ed. 1993) 7

ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3 cmt. (3d ed. 1993) 6, 15

ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3(c) (3d ed. 1993) 10

Editorial, *Trial Judge to Appeals Court: Review Me*, N.Y. Times (July 16, 2012), http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html..... 16

Jacob Szewczyk, Comment, *Following Orders: Campbell v. United States, The Waiver of Appellate Rights, and the Duty of Counsel*, 64 Cath. U. L. Rev. 489 (2015)..... 14

Joel Cohen, *When Lawyers Admit "Ineffectiveness,"* N.Y. L.J. (Apr. 13, 2010), https://www.stroock.com/siteFiles/Pub918.pdf .. 17

Lauren Gregorcyk, Note, *A Justified Obligation: Counsel's Duty to File a Requested Appeal in a Post-Waiver Situation*, 20 Wash. & Lee J. Civil Rts. & Soc. Just. 141 (2013) 17

Model Code of Judicial Conduct Canon 1 (Am. Bar Ass'n 1990)..... 15

Model Code of Judicial Conduct r. 2.2 (Am. Bar Ass'n 1990)..... 13

Model Code of Judicial Conduct r. 2.5(A) (Am. Bar Ass'n 1990)..... 14

Model Code of Judicial Conduct r. 2.5-2.7 (Am. Bar Ass'n 1990) 12

Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209 (2005) 12

Restatement (Third) of Agency § 8.09(2) (Am. Law Inst. 2006) 7

Restatement (Third) of the Law Governing Lawyers § 110 cmt. f (Am. Law Inst. 2000) 9

Restatement (Third) of the Law Governing Lawyers § 110(1) (Am. Law Inst. 2000) 9

Restatement (Third) of the Law Governing Lawyers § 21 (Am. Law Inst. 2000) 8

Restatement (Third) of the Law Governing Lawyers § 22(1) (Am. Law Inst. 2000) 7

Robert E. Scott & William J. Stuntz, *Symposium: Punishment, Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992) 15

CONSENT TO FILE AS *AMICUS CURIAE*

Pursuant to Rule 37, this brief is filed with the consent of the parties. The brief is submitted by the Ethics Bureau at Yale in support of Petitioner. Letters of consent from both parties to this appeal have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The Ethics Bureau at Yale[1] is a clinic composed of sixteen law school students supervised by an experienced practicing lawyer, lecturer, and ethics teacher. The Bureau has drafted amicus briefs in matters involving lawyer and judicial conduct and ethics; has assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility; and has provided assistance, counsel and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Because this case implicates a lawyer's ethical obligations to obey his client's objectives during the course of the representation, the Bureau believes it

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[1] The Ethics Bureau at Yale is a student clinic of the Yale Law School. The views expressed herein are not necessarily those of Yale University or Yale Law School. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *Amicus Curiae* has made a monetary contribution to the preparation and submission of this brief.

might assist the Court in resolving the important issues presented.

SUMMARY OF ARGUMENT

This case implicates an important question that has divided lower courts for over a decade: whether when a defendant asks his lawyer to file an appeal and the lawyer fails to do so because the defendant signed an appeal waiver as part of a plea agreement, a court should presume that the defendant was prejudiced by his counsel's conduct. The majority of lower courts to address the question have presumed prejudice when evaluating ineffective assistance of counsel claims in this context. The court below, however, did not. Because this Court's Sixth Amendment jurisprudence, as well as legal ethics and agency law, make clear that the client retains final control over the decision to appeal, *Amicus* believes that the decision below was wrongly decided and that courts should presume prejudice in these cases.

The facts of this case are straightforward and undisputed. In 2015, Gilberto Garza, Jr. pled guilty separately to aggravated assault and possession of controlled substance. Both plea agreements included an appeal waiver. Mr. Garza subsequently told his lawyer that he wanted to appeal his sentence. But, despite this instruction, his lawyer did not file an appeal because he concluded that "Mr. Garza [had] received the sentence(s) he bargained for" and that "an appeal was problematic because [Mr. Garza] waived his right to appeal." Pet. App. 52a. Mr. Garza filed a pro se petition for post-conviction relief alleging that his counsel rendered ineffective

assistance of counsel by refusing to file to a notice of appeal at his request. The Supreme Court of Idaho affirmed the District Court's and Court of Appeals' denial of relief.

The Constitution, the ethical code of the Idaho Supreme Court, and the common law vest the decision to file an appeal in the client. This rule reflects the fundamental precept that the client, not the lawyer, has the final say over the objectives of a representation. This Court has already concluded that courts should presume prejudice when a lawyer fails to file a notice of appeal at the request of his client. *See Rodriquez v. United States*, 395 U.S. 327 (1969). That presumption applies no less in cases in which a lawyer believes that an appeal would be frivolous. The Constitution and basic tenets of legal ethics and agency law protect a defendant's right to file an appeal that non-judicial actors deem frivolous. *See Anders v. California*, 386 U.S. 738, 744 (1967). And because appellate waivers bar only a subset of potential appeals, it is essential that a court review the merits of a claim.

This case also represents an assault on the fundamental role of courts and defense lawyers in our criminal justice system. The decision below would usurp from courts the ability to conduct an independent review of the merits of an appeal, upending the traditional division of authority in the courtroom—where lawyers serve as advocates and judges as final arbiters. In effect, it "confers upon [actors] outside the judicial system power to take from an indigent all hope of any appeal at all." *Lane v. Brown*, 372 U.S. 477, 485 (1963). Furthermore, the

current disagreement among lower courts regarding the proper division of authority in this context has left defense lawyers deeply confused as to their responsibility under the Sixth Amendment to file appeals that plea agreements appear to bar.

In light of these considerations, *Amicus* urges this Court to grant certiorari and reverse the judgment of the court below.

ARGUMENT

I. Criminal Defendants Have a Right to Counsel Who Will File a Notice of Appeal on Their Behalf.

The client, not the lawyer, has the authority to decide whether to appeal a case. This Court has held that, under the Sixth Amendment, it is ineffective assistance of counsel for a lawyer to refuse to file a requested appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000). Principles of legal ethics and agency law likewise specify that the decision to appeal is under the client's sole control. These authorities make clear that the client retains control over the decision to appeal even when counsel believes that the appeal might be frivolous. In reliance on this well-established understanding of the attorney-client relationship, defendants entrust their lawyers to carry out their instructions. Thus, when a lawyer fails to file a requested appeal, the lawyer violates the Constitution and fundamental principles of legal ethics and agency law.

A. Fundamental Principles of Constitutional Law, Legal Ethics, and Agency Law Vest the Final Decision to Appeal in the Client.

The defendant's right to appeal is central to the protections provided by the Sixth Amendment. This Court has held that the Sixth Amendment guarantees defendants effective assistance of counsel, and that a lawyer who ignores his client's instructions to file an appeal is presumed to have rendered ineffective assistance. *See Flores-Ortega*, 528 U.S. at 477. This clear delineation of authority is critical because a lawyer who fails to file a requested appeal does not merely neglect his professional duty, but also deals his client "the serious denial of the entire judicial proceeding itself." *Id.* at 483. Indeed, this Court has gone even farther, ruling that counsel must not only perform the simple task of filing a notice of appeal, but must also "act[] in the role of an active advocate in behalf of his client," a role which "requires that he support his client's appeal to the best of his ability." *Anders v. California*, 386 U.S. at 744. As a consequence, a defendant whose lawyer fails to file a requested appeal is entitled to a new appeal without demonstrating that it would likely have been successful. *See Rodriquez*, 395 U.S. at 330.

The defendant's right to decide whether to appeal his case is a vital procedural protection. Most significantly, ignoring a client's express decision to appeal is "professionally unreasonable . . . because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Flores-Ortega*, 528 U.S. at 477. Defendants whose lawyers ignore their instructions are often left

to file "petitions for relief from time limitations on filing appeals or . . . postconviction collateral attacks on the ground of inadequate representation." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3 cmt. (3d ed. 1993). Moreover, many of these defendants, like Mr. Garza, will be forced to make these claims pro se. As this Court wrote when it recognized the right to counsel for a first appeal, "[w]hen an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." *Douglas v. California*, 372 U.S. 353, 357 (1963). Defendants rely on counsel to pursue their objectives. To allow lawyers to do otherwise would undermine the sanctity of the attorney-client relationship and defendants' Sixth Amendment rights.

Principles of legal ethics and agency law likewise prescribe that, throughout the course of a representation, clients retain control over final decisions and, specifically, the decision to appeal.[2] The American Bar Association, for example, has made clear that "[t]he decision whether to appeal must be the defendant's own choice." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.2(a) (3d ed. 1993); *see also id.*

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[2] This Court has previously looked to national ethical standards in construing constitutional requirements. *See, e.g., Nix v. Whiteside*, 475 U.S. 157, 167 (1986) (citing to common understandings of professional ethics in construing lawyers' Sixth Amendment duties when a client plans to present perjured testimony at trial). Principles of agency law have often been used to illuminate a lawyer's duties in the course of representation. *See Maples v. Thomas*, 565 U.S. 266, 283 (2012); *Holland v. Florida*, 560 U.S. 631, 659-60 (2010) (Alito, J., concurring).

4-8.2(b) ("Defense counsel should take whatever steps are necessary to protect the defendant's rights of appeal."); *id.* 4-5.2(a)(v) (noting that "[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel," and providing that the decisions to be made by defendants include "whether to appeal"). The Restatement of Law Governing Lawyers likewise states that the decision to appeal a criminal prosecution is reserved to the client. *See* Restatement (Third) of the Law Governing Lawyers § 22(1) (Am. Law Inst. 2000).

This assignment of authority reflects broader principles of agency law and legal ethics which give the client control over final decisions. It is well-established under the common law that lawyers are their clients' agents. *See C.I.R. v. Banks*, 543 U.S. 426, 436 (2005) (describing the attorney-client relationship as "a quintessential principal-agent relationship"). A lawyer remains at all times bound to respect his client's fundamental wishes regarding the objectives of the representation. *See* Restatement (Third) of Agency § 8.09(2) (Am. Law Inst. 2006) ("An agent has a duty to comply with all lawful instructions received from the principal . . . ."); *see also Faretta v. California*, 422 U.S. 806, 820 (1975) ("[The Sixth Amendment] speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."). The Restatement of Law Governing Lawyers and the Model Rules of Professional Conduct[3] likewise assign the authority to define the objectives of the representation to the client. *See*

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[3] The Idaho Rules of Professional Conduct follow the Model Rules in all relevant respects.

Restatement (Third) of the Law Governing Lawyers § 21; Model Rules of Prof'l Conduct r. 1.2(a) (Am. Bar Ass'n 1983). In keeping with these broader principles, the law assigns the decision whether to appeal—an objective of the representation—to the client.

In this case, Mr. Garza clearly conveyed that he wanted to appeal his case, and his lawyer violated the Sixth Amendment as well as principles of legal ethics and agency law when his lawyer disregarded that direction. Mr. Garza's lawyer acknowledged that Mr. Garza instructed him to file an appeal in his affidavit in the District Court. *See* Pet. App. 52a. Once Mr. Garza established as one of his objectives to appeal, his lawyer should not have deviated from that objective. Defense counsel's failure to carry out his professional obligations forced Mr. Garza to petition, initially pro se, to regain his right to appeal—a right that his lawyer had given up against his wishes. A lawyer who puts his client in such a position has acted in a way that is "professionally unreasonable." *Flores-Ortega*, 528 U.S. at 477.

B. Counsel Are Required To File a Notice of Appeal Even When They Fail To Identify Any Appealable Issues.

This Court has recognized a tension between the constitutional right of defendants to have an active advocate on appeal and the professional obligation of counsel not to file frivolous appeals. *See McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 437 (1988). But in reconciling this tension, this Court has not wavered from the principle that defendants have a right to file an appeal and to the

effective assistance of counsel in doing so. Instead, it has addressed the problem of frivolous appeals by recommending that lawyers follow the procedure described in *Anders v. California*. That is, when a client asks his lawyer to file an arguably frivolous appeal, the lawyer should file a notice of appeal, submit "a brief referring to anything in the record that might arguably support the appeal," and request permission to withdraw. *Anders*, 386 U.S. at 744. This procedure, requiring lawyers to file "*Anders* briefs," allows defense counsel to act "with honor and without conflict," *id.*, but even more importantly, it preserves defendants' right to appeal.

Principles of legal ethics strike a similar balance between defendants' constitutional right to counsel and lawyers' professional obligation not to file frivolous appeals. As a general rule, counsel may not file frivolous arguments. *See* Model Rules of Prof'l Conduct r. 3.1; Restatement (Third) of the Law Governing Lawyers § 110(1). But lawyers' professional obligations "are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited." Model Rules of Prof'l Conduct r. 3.1; *see also* Restatement (Third) of the Law Governing Lawyers § 110 cmt. f ("[A] lawyer representing a convicted person on appeal may be required to file a so-called *Anders* brief in the event the lawyer concludes that there is no nonfrivolous ground on which the appeal can be maintained."). The ethical rules governing lawyers' conduct likewise draw an important distinction between assisting a client on appeal—which is constitutionally required—and

actively deceiving the court or opposing parties—which is prohibited. *See* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3(c).

Requiring lawyers to abide by their clients' wishes and file an appeal serves a number of vital interests. Most importantly, these procedures preserve defendants' right to appeal. As this Court has noted, "a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Flores-Ortega*, 528 U.S. at 477. Without a rule ensuring that counsel file such a notice, a defendant may lose his right to any form of appellate review.

These procedures also improve the process by which appeals go forward. *Anders* briefs, for example, "'provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeal to the best of their ability'" and also "provide[] an independent inducement to counsel to perform a diligent review" of the case. *Penson v. Ohio*, 488 U.S. 75, 81, 82 & n.4 (1988) (quoting *McCoy*, 486 U.S. at 439). This review by both counsel and the court is essential even in the appeal waiver context because a valid waiver does not automatically preclude a defendant from challenging the sentence or conviction, for example, when the appeal goes "to the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge v. Perry*, 417 U.S. 21, 30 (1974) (vindictive prosecution); *see Menna v. New York*, 423 U.S. 62 (1975) (double jeopardy); *see also United States v.*

Marin, 961 F.2d 493, 496 (4th Cir. 1992) (use of a "constitutionally impermissible factor such as race" at sentencing). It is also important to note that the timing for filing a notice of appeal is often extremely short, which suggests that lawyers should not foreclose the possibility of a meritous appeal at this stage. Cursory review does not satisfy a defendant's right to effective counsel and may lead to additional postconviction collateral claims. *See* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.2 cmt.

This case implicates a particularly stark set of facts. Here, Mr. Garza's lawyer not only offered a "conclusory statement that the appeal was meritless," *McCoy*, 486 U.S. at 443, but also never presented this conclusory statement to a court for further review. *See Smith v. Robbins*, 528 U.S. 259, 281 (2000) (noting that a "flaw with the procedures" in past cases "was that there was only one tier of review"). Instead, defense counsel simply concluded that "Mr. Garza received the sentence(s) he bargained for" and told Mr. Garza "that the appeal was problematic because he waived his right to appeal" in his plea agreement. Pet. App. at 52a.

The conclusory statement by Mr. Garza's lawyer does not satisfy the Sixth Amendment right to counsel. Instead, it is unclear whether Mr. Garza's lawyer "diligently investigated the possible grounds of appeal." *Anders*, 386 U.S. at 742. And even if he had conducted a more diligent investigation, Mr. Garza's lawyer would still not have had the unilateral authority to waive his client's right to appeal. As the preceding Section made clear, the Constitution and

rules of legal ethics vest the final decision to appeal in the defendant. Any decision that vests the authority in the lawyers can "not meet constitutional standards." *Lane*, 372 U.S. at 485.

II. This Court Should Grant Certiorari To Preserve the Role of Courts as the Final Arbiter of Appeals.

Whether an appeal raises any non-frivolous issues is a decision for the appellate court—not defense counsel—to make. When a lawyer fails to file a requested appeal, that disobedience not only undermines the client's right to decide whether to appeal, but also usurps the authority of the court to decide the merits of the appeal. Direct appellate review is entirely eliminated. Thus, in addition to safeguarding the fundamental rights of criminal defendants, the procedures set forth in *Anders* protect important judicial interests.

First, effective defense counsel must be required to file a notice of appeal so that appellate courts retain their role as neutral decision makers. The ethical rules governing the conduct of legal actors divide authority between counsel and courts, and ultimately courts are supposed to decide whether appeals are meritorious. *See* Model Code of Judicial Conduct r. 2.5-2.7 (Am. Bar Ass'n 1990); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 223 (2005). In *Anders*, this Court stated that counsel must "support his client's appeal to the best of his ability," and then the *court* must conduct "a full examination of all the proceedings, to decide whether the case is

wholly frivolous." *Anders*, 386 U.S. at 744. This proper division of labor in the courtroom helps to advance the ethical duties of both judges and lawyers.

One of defense counsel's most critical roles is that of an advocate. Accordingly, lawyers not only lack the authority to determine if an appeal should be granted, but would violate the duty of loyalty owed to their clients by exercising such authority. The Model Rules of Professional Conduct provide that, as advocates, lawyers must "zealously assert[] the client's position under the rules of the adversary system." Model Rules of Prof'l Conduct pmbl.; *see also* Model Rules of Prof'l Conduct r. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."). As this Court has held, while an effective "attorney need not advance *every* argument, regardless of merit, urged by the appellant," counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

The judge, rather than defense counsel, is charged with providing this "detached evaluation." It is the unique role of judges to decide the merits of the cases that come before them. *See* Model Code of Judicial Conduct r. 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."). The most fundamental "role [of] a court is as arbiter of the interests of Government and accused." *Suggs v. United States*, 391 F.2d 971, 975 (D.C. Cir. 1968). Thus, *Anders* was meant to ensure that appellate judges "successfully and constitutionally perform that function" by

"consider[ing] a presentation devoted to arguments for the accused, leaving it to [the court] to determine whether and to what extent they have merit." *Id.* In this case, however, when Mr. Garza's lawyer failed to file a notice of appeal, he unilaterally appointed himself to preside over his own client's appeal—and then proceeded to do so in direct contravention of Mr. Garza's interests. *See* Jacob Szewczyk, Comment, *Following Orders:* Campbell v. United States, *The Waiver of Appellate Rights, and the Duty of Counsel*, 64 Cath. U. L. Rev. 489, 512 (2015).

Anders briefs, moreover, ensure that courts carry out their role competently by directing reviewing judges to those parts of the record that might arguably support the appeal. *See McCoy*, 486 U.S. at 442; Model Code of Judicial Conduct r. 2.5(A) (obligating judges to perform their duties "competently and diligently"). In *Anders*, this Court established a procedure that would allow defense counsel to ethically provide adequate "assistance to his client *and to the court*." *Anders*, 386 U.S. at 744 (emphasis added). Without the effective assistance of counsel, an appeal might devolve into a "meaningless ritual," since, for virtually any layperson, "the services of a lawyer will . . . be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Evitts*, 469 U.S. at 393-94 (quoting *Douglas*, 372 U.S. at 358). *Anders* briefs, therefore, serve the "valuable purpose of assisting the court" in competently determining both whether "counsel in fact conducted the required detailed review of the case" and whether "the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Penson*, 488 U.S. at 81-82

(1988); *see also Anders*, 386 U.S. at 745. *Cf.* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3 cmt. (noting that it "is also in the public interest" to expeditiously obtain complete and final determinations of all cases).

Lastly, without a notice of appeal, judges may not reliably fulfill their duty to protect the legitimacy of the legal system. The First Canon of the Model Code of Judicial Conduct states that judges, as the final arbiters of every case over which they preside, "shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Model Code of Judicial Conduct Canon 1. The proper division of responsibility between judges and lawyers on appeal is one way for courts to protect their "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988); *see also Offutt v. United States*, 348 U.S. 11, 14 (1954) ("Justice must not only be done, it must appear to be done."). Moreover, this judicial duty is especially important in the plea bargaining context. For, today, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Symposium: Punishment, Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)).

When lawyers fail to file notices of appeal, courts simply cannot guarantee defendants an

"adequate and effective" appeal. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). Appellate judges are rendered powerless, incapable of guarding against the accidental waiver of viable claims by defense lawyers. As a result, the very purpose of systems of appeal as of right—to "assure that only those who are validly convicted have their freedom drastically curtailed"—are dangerously undercut. *Evitts*, 469 U.S. at 400. The judiciary has a duty to protect every individual defendant's fundamental rights and, in turn, to uphold the integrity of the legal system writ large.

III. The Decision Below Creates Needless Confusion and Uncertainty for Criminal Defense Lawyers.

The decision below reflects a longstanding split of authority regarding a criminal defense lawyer's duty to file an appeal in the post-waiver context. Criminal defense lawyers remain unsure of their legal and ethical duties when faced with plea bargains that include appellate waivers. Moreover, this issue comes up frequently, due in part to the pervasiveness of plea bargaining. The overwhelming majority of criminal cases are resolved through plea bargaining negotiations. *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

The prevalence of plea bargaining only amplifies the need for clarification in this case. *See* Editorial, *Trial Judge to Appeals Court: Review Me*, N.Y. Times (July 16, 2012), http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html. Since the

Sentencing Reform Act of 1984, appellate waivers have only increased in popularity with judges and prosecutors' offices around the country. *See* Lauren Gregorcyk, Note, *A Justified Obligation: Counsel's Duty to File a Requested Appeal in a Post-Waiver Situation*, 20 Wash. & Lee J. Civil Rts. & Soc. Just. 141, 147-148 (2013).

The current disagreement among lower courts has fostered significant uncertainty for criminal defense lawyers. The decision below only adds to the confusion. Lawyers need to know not only whether filing a notice of appeal in this context is frivolous, but also whether it is constitutionally required. Asking criminal defense lawyers to sift through inconsistent or contradictory standards notably jeopardizes the ability of defense lawyers to perform as competent counsel. Indeed, the current split of authority has resulted in an anomalous state of affairs in which lawyers in some states—such as in Idaho—may be subject to one constitutional standard in state court and another in federal court. *Compare Garza v. State*, 405 P.3d 576 (Idaho 2017), *with United States v. Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005).

In addition, criminal defense lawyers have a personal interest in understanding the law regarding ineffective assistance of counsel because being found "ineffective" directly affects their professional standing. *See* Joel Cohen, *When Lawyers Admit "Ineffectiveness,"* N.Y.L.J. (Apr. 13, 2010), https://www.stroock.com/siteFiles/Pub918.pdf ("There is nothing worse for a criminal lawyer than personal guilt for having waged an inadequate defense that results in a miscarriage of justice for his

client."). In deciding to file an appeal in the post-waiver context, criminal defense lawyers might worry that they must choose whether to pursue their clients' interests or to follow a more convenient or professionally beneficial course. In short, the current split of authority leaves criminal defense lawyers in the dark as to whether their decision to file an appeal from a plea agreement containing an appeal waiver might amount to ineffective assistance of counsel. This Court should therefore grant certiorari and clarify the obligations of criminal defense lawyers in this recurrent situation.

CONCLUSION

Criminal defense lawyers should be constitutionally required to file an appeal where directed to do so by their client, even if their client signed a plea agreement containing an appeal waiver. To hold otherwise would undermine the right to effective assistance of counsel under the Sixth Amendment, fundamental requirements of ethics and agency law, and the traditional division of authority between defense lawyers and courts in the criminal justice system. Further, defense counsel should know the scope of their duty to file an appeal so that they are able to both protect their clients' constitutional rights and avoid compromising their professional standing. Defendants, not their counsel, should have the ultimate authority to choose to appeal. For these reasons, *Amicus* urges this Court to grant certiorari and reverse the judgment below.

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In the

Supreme Court of the United States

GILBERTO GARZA JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

REASONS FOR GRANTING THE WRIT 2

I. THE QUESTION PRESENTED IS IMPORTANT 2

II. APPELLATE WAIVERS RESULT FROM UNEQUAL BARGAINING POWER 5

III. REVIEW WILL CLARIFY THE DUTIES OF DEFENSE COUNSEL 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s):

Cases:

Anders v. California,
386 U.S. 738 (1967) 9

Brady v. Maryland,
373 U.S. 83 (1963) 7

Campbell v. United States,
686 F.3d 353 (6th Cir. 2012) 4

Campusano v. United States,
442 F.3d 770 (2d Cir. 2006) 3

Carnival Cruise Lines, Inc. v. Shute,
499 U.S. 585 (1991) 6

Lee v. United States,
137 S. Ct. 1958 (2017) 3

Missouri v. Frye,
566 U.S. 134 (2012) 4

Penson v. Ohio,
488 U.S. 75 (1988) 2

Richardson-Merrell, Inc. v. Koller,
472 U.S. 424 (1985) 8

Roe v. Flores-Ortega,
528 U.S. 470 (2000) ..... *passim*

Smith v. Robbins,
528 U.S. 259 (2000) 2

Strickland v. Washington,
466 U.S. 668 (1984) 2, 4

United States v. Cronic,
466 U.S. 648 (1984) 2

United States v. Garrett,
402 F.3d 1262 (10th Cir. 2005) 3

United States v. Gomez-Perez,
215 F.3d 315 (2d Cir. 2000) 3

United States v. Raynor,
989 F. Supp. 43 (D.D.C. 1997) 7

United States v. Sandoval-Lopez,
409 F.3d 1193 (9th Cir. 2005) 10

Rules:

S. Ct. R. 37.2(a) 1

Other Authorities:

Alexandra W. Remelt,
An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal,
51 B.C. L. Rev. 871 (2010) 6, 7

Beth Schwarzapfel,
Defendants Kept in the Dark About Evidence, Until It's Too Late, New York Times,
https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html
(Aug. 7, 2017) 7

Daniel P. Blank,
Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation,
68 Fordham L. Rev. 2011 (2000) 6

Jacob Szewcyzk,
Following Orders: Campbell v. United States, *The Waiver of Appellate Rights, and the Duty of Counsel*,
64 Cath. U. L. Rev. 489 (2015) 5

Lauren Gregorcyk,
A Justified Obligation: Counsel's Duty to File a Requested Appeal in a Post-Waiver Situation,
20 Wash. & Lee J. Civ. Rts. & Soc. Just. 141 (2013) 5

Nancy J. King & Michael E. O'Neill,
Appeal Waivers and the Future of Sentencing Policy,
55 Duke L.J. 209 (2005) 4, 5

Robert K. Calhoun,
Waiver of the Right to Appeal,
23 Hastings Const. L.Q. 127 (1995) 6

Steven L. Chanenson,
Guidelines from Above and Beyond,
58 Stan. L. Rev. 175 (2005) 6

INTEREST OF AMICUS CURIAE[1]

Established in 1989, the Idaho Association of Criminal Defense Lawyers (IACDL) is a non-profit, voluntary organization of attorneys. Currently, IACDL has over 400 lawyer members, all of whom practice criminal defense. IACDL's membership includes both public defenders and private counsel, attorneys who work in both state and federal court, and attorneys who focus on trials, appeals, post-conviction, and federal habeas proceedings. One of IACDL's primary goals is to improve the quality of representation provided to criminal defendants in Idaho, especially those who cannot afford to retain counsel. For those reasons, IACDL has a strong commitment to ensure that Idaho defendants receive adequate assistance of counsel at trial, and that they are able to fully effectuate their right to an appeal.

Furthermore, given the size and breadth of IACDL's membership, the organization has substantial expertise in the practical circumstances on the ground in Idaho regarding how defense attorneys, their clients, and courts operate. IACDL likewise has insight into how each of those actors deals with the issues implicated by the case at bar, i.e., plea agreements, waivers of appellate rights, notices of appeal, and ineffective-assistance claims. Accordingly, IACDL has both the interest and the knowledge to assist the Court with its resolution of the petition for certiorari.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received 10 days' notice of the filing of this brief and provided written consent to its filing.

REASONS FOR GRANTING THE WRIT

IACDL agrees fully with the contentions made in the Petition for a Writ of Certiorari and offers the additional points below in support of Petitioner.

I. THE QUESTION PRESENTED IS IMPORTANT.

In addition to the acknowledged circuit split, (Pet. 8-9), the Question Presented is especially important because it involves a defendant deprived of a "proceeding itself" and arises frequently.

First, this Court has repeatedly protected the rights of individuals who have forfeited a judicial proceeding due to the decisions or performance of their attorney. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *Flores-Ortega*, this Court described the distinction, based on a long line of case law, between ineffective assistance that merely causes "a judicial proceeding of disputed reliability" and ineffective assistance that causes "the forfeiture of a proceeding itself." 528 U.S. at 483 (citing *Smith v. Robbins*, 528 U.S. 259 (2000); *Penson v. Ohio*, 488 U.S. 75 (1988); *United States v. Cronic*, 466 U.S. 648 (1984)).

This Court held, "[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Flores-Ortega*, 528 U.S. at 484. Courts should presume prejudice "with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding . . . entirely nonexistent." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 693-96 (1984)).

For more than a decade, Circuit Courts have interpreted *Flores-Ortega* to apply when defendants entered a plea agreement that included an appellate waiver. *See, e.g., Campusano v. United States*, 442 F.3d 770, 774 (2d Cir. 2006) (Sotomayor, J.); *United States v. Garrett*, 402 F.3d 1262, 1265-66 (10th Cir. 2005). For example, the Second Circuit reasoned that "important constitutional rights require some exceptions to the presumptive enforceability of [an appellate] waiver. . . . These constitutional protections are endangered if counsel fails to pursue an appeal without advising a client of the reasons for doing so." *Campusano*, 442 F.3d at 774-75 (citing *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000)). Likewise, the Tenth Circuit reasoned that the presumption of prejudice in post-waiver cases "serves to safeguard important interests with concrete and potentially dispositive consequences which can be guaranteed only by the direct-appeal process and the concomitant right to counsel." *Garrett*, 402 F.3d at 1265-66.

Just last Term, this Court reaffirmed the importance of the *Flores-Ortega* presumption of prejudice where an attorney's "deficient performance arguably led . . . to the forfeiture of a proceeding itself." *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (citing *Flores-Ortega*, 528 U.S. at 483). Rejecting the Government's argument that a petitioner seeking to overturn a guilty plea could not show prejudice because he would have been unlikely to succeed at trial, this Court stated that the presumption of reliability in judicial proceedings "has no place where, as here, a defendant was deprived of a proceeding altogether." *Id.* at 1967.

Petitioner here was similarly "deprived of a proceeding altogether," a direct appeal. Because such complete deprivations are so important to ineffective assistance claims under *Strickland*, the Question Presented should be reviewed.

Second, the Question Presented will frequently recur until this Court acts to resolve the issue. The vast majority of criminal convictions follow plea agreements. *See, e.g., Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). Moreover, most plea agreements include an appellate waiver. *See, e.g.*, Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 231, 232 fig.7 (2005) (sixty-five percent of plea agreements across the Federal circuits include appellate waivers).

Due to the ubiquity of plea agreements and appellate waivers, some defendants will continue to find themselves in the same position as Petitioner: desiring to appeal after a guilty plea, but with counsel who choose not to file a notice of appeal because of an appellate waiver. Indeed, the Question Presented has arisen with such regularity since *Flores-Ortega* that ten of the federal Circuit Courts have decided it. *See Campbell v. United States*, 686 F.3d 353, 359 (6th Cir. 2012) (surveying cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits and concluding that "prevailing precedent from the Supreme Court, the Sixth Circuit, and the majority of our sister circuits mandates that even [after an appellate waiver] a defendant is entitled to counsel who will follow through on express instructions to proceed with an appeal").

Scholarly attention further shows the importance of the Question Presented. *See, e.g.*, Jacob Szewcyzk, Comment, *Following Orders:* Campbell v. United States, *The Waiver of Appellate Rights, and the Duty of Counsel*, 64 Cath. U. L. Rev. 489, 513 (2015) ("holding that defense counsel has provided ineffective assistance of counsel when failing to follow orders from his client to file an appeal, even if his client has waived that right, is the best way to protect defendants' rights and ability to make decisions regarding their own criminal proceedings"); Lauren Gregorcyk, Note, *A Justified Obligation: Counsel's Duty to File a Requested Appeal in a Post-Waiver Situation*, 20 Wash. & Lee J. Civ. Rts. & Soc. Just. 141, 174 (2013) ("appellate waivers should not alter pre-existing obligations between defense attorneys and their clients, like the obligation to file a requested appeal"); King & O'Neill, *supra*, 55 Duke L.J. at 256 ("Appeal waivers are firmly entrenched in plea agreement practice in federal courts.").

In sum, the Question Presented is important and frequently recurring. It is fully developed. It is not going away. It merits this Court's review.

II. APPELLATE WAIVERS RESULT FROM UNEQUAL BARGAINING POWER.

One dubious defense of the minority position is that criminal defendants must live with the deal they have struck, a "freedom of contract" type of argument. *See, e.g.*, Pet. App. 14a ("a plea agreement is a bilateral contract, to which both the State and defendant are bound"). As an initial matter, this argument misunderstands the effect of the bargain that has been struck by the defendant. As Petitioner

explains, a defendant who has signed a plea waiver maintains the right to appeal a number of important constitutional issues. Pet. 10.

The argument also presumes that criminal defendants have significant bargaining power when negotiating a plea agreement. The reality on the ground is quite different. *See, e.g.*, Steven L. Chanenson, *Guidelines from Above and Beyond*, 58 Stan. L. Rev. 175, 182 (2005) ("there is reason to question how much real trading occurs"); Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 211 (1995) ("appeal waivers look . . . more like the price of admission to engage in the plea bargaining process at all"); Alexandra W. Remelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. Rev. 871, 904 (2010) (discussing how defendants have little choice but to accept plea agreements); Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 Fordham L. Rev. 2011, 2014 (2000) (discounting the notion that the ability to waive appellate rights operates as a bargaining chip).

Plea agreements are akin to contracts of adhesion, which are, as this Court has noted, "form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600 (1991). Prosecutors set the terms of plea agreements and present the fully drafted document to defense counsel, not the other way around. The plea agreements Petitioner entered are good examples, both containing nearly identical terms in what appears to be a sort of fill-in-the-blanks template. *Compare* Pet. App. 40a-45a *with* Pet. App. 46a-50a.

Some courts and commentators have recognized the inherent inequality in bargaining power between prosecutors and defendants. *See United States v. Raynor*, 989 F. Supp. 43, 49 (D.D.C. 1997) (describing plea negotiations as "inherently unfair; it is a one-sided contract of adhesion; it will undermine the error correcting function of the courts of appeals in sentencing."). Prosecutors determine the actual charge or charges brought against the defendant, which in turn determine the ultimate sentence that will result from the charges. Remelt, *supra*, 51 B.C. L. Rev. at 888. Prosecutors then create the terms of the plea agreement, and it is up to the defendant to enter into the contract on a *take-it or leave-it* basis. *Id.*

The lack of bargaining power is particularly alarming in the ten states that do not require prosecutors to provide discovery until shortly before trial. *See* Beth Schwarzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, New York Times (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html. In those jurisdictions, prosecutors often plea bargain without having provided information that could potentially be helpful to the defense, including disclosures required by this Court in *Brady v. Maryland*, 373 U.S. 83 (1963); Schwarzapfel, *supra* (noting "lower courts have split over whether *Brady* material must be turned over before a plea").

In short, a criminal defendant's "freedom of contract" should not prevent a presumption of prejudice from arising when counsel fails to file an appeal based on an appeal waiver.

III. REVIEW WILL CLARIFY THE DUTIES OF DEFENSE COUNSEL.

By resolving the question presented, this Court will provide needed clarity to defense attorneys regarding their duty to file a notice of appeal and their related duty to consult with their clients regarding an appeal. First, the minority position allows *attorneys* to decide whether to appeal, not their clients. The State of Idaho argued below, for example, that Petitioner's "appeal waivers negated the duty his trial counsel otherwise would have had to file appeals at his request." Pet. App. 30a. In accepting this argument, the minority position ignores the long-held understanding that it is defendants who make the ultimate decision to appeal. *See, e.g.*, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 (1985) ("As a matter of professional ethics, . . . the decision to appeal should turn entirely on the client's interest."); *Flores-Ortega*, 528 U.S. at 479 ("the decision to appeal rests with the defendant"); ABA Criminal Justice Standard 4-5.2(a)(v) ("The decisions which are to be made by the accused after full consultation with counsel include . . . whether to appeal.").

Second, the minority position also allows defense attorneys to neglect their duty to consult with their clients about an appeal. This Court held in *Flores-Ortega* that defense counsel "has a constitutionally imposed duty" to consult with a defendant who has "reasonably demonstrated to counsel that he was interested in appealing." 528 U.S. at 480; *see also id.* at 488 (Breyer, J., concurring) ("in my view . . . counsel does 'almost always' have a constitutional duty to consult with a defendant about an appeal after a trial"). Here, it is apparent that Petitioner's attorney failed to discharge his duty to consult, despite

Petitioner asking him to appeal in "numerous phone calls and letters." Pet. App. 3a; *see also Flores-Ortega*, 528 U.S. at 493-94 (Ginsburg, J., concurring in part and dissenting in part) ("I think it plain that the duty to consult was not satisfied in this case").

The court below misread *Flores-Ortega* as broadly not compelling a presumption of prejudice in the "failure to consult context," Pet. App. 10a, while ignoring this Court's clear holdings that a duty to consult arises when a client has demonstrated an interest in appealing and that a presumption of prejudice *does* arise when counsel's performance "deprives a defendant of an appeal that he otherwise would have taken." 528 U.S. at 484.

Overlooking these duties, the minority position places undue weight on a defense attorney's duty not to file "frivolous" litigation. *See* Pet. App. 13a, 26a. More than a half-century ago, this Court provided a remedy for defense counsel who are asked to file an appeal they believe to be frivolous, in *Anders v. California*, 386 U.S. 738, 744-45 (1967). The solution is not to ignore the client's request to appeal. The court below did not make a single reference to *Anders*. *See* Pet. App. 1a-15a.

Finally, this Court's review will prevent the anomaly, created by the split in courts below, that defense attorneys in the same town have varying duties based on whether they are in state court or federal court. Due to the conflict between the Idaho Supreme Court and the Ninth Circuit, which follows the majority rule, the performance of a Boise attorney in state court is not presumed to be prejudicial if he ignores a client's request to appeal, while in federal court it is. *Compare* Pet. App. 15a ("This Court does

not presume counsel to be automatically ineffective when counsel declines to file an appeal in light of an appeal waiver.") *with United States v. Sandoval-Lopez*, 409 F.3d 1193, 1197 (9th Cir. 2005) (if "it is true that he explicitly told his lawyer to appeal his case and his lawyer refused, then we are required by *Flores-Ortega* to conclude that it was deficient performance not to appeal and that *Sandoval-Lopez* was prejudiced").

Therefore, this Court's review is needed to clarify the constitutional duties of defense counsel related to appellate filing and consultation when their clients' plea agreements contain an appellate waiver.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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QUESTION PRESENTED

Does the "presumption of prejudice" recognized in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

TABLE OF CONTENTS

Page

Question Presented i
Table Of Authorities v
Introduction 1
Opinions Below 2
Jurisdiction 3
Constitutional Provision Involved 3
Statement 3
Summary Of Argument 7
Argument 10
I. The Presumption Of Prejudice Applies When An Attorney Fails To Notice An Appeal At The Direction Of A Defendant Who Has Signed An Appeal Waiver 10
A. Under *Roe* v. *Flores-Ortega*, Prejudice Is Presumed If An Attorney Disregards An Instruction To File A Notice Of Appeal 10
B. This Court Should Not Create An Exception For Cases In Which A Defendant Has Signed An Appeal Waiver 14
1. An attorney's failure to file an appeal at the direction of his client results in the forfeiture of an entire proceeding 16
2. An attorney's failure to file an appeal requested by his client usurps a decision committed to the client alone 23
3. It would be profoundly unfair to require defendants to make an individualized showing of prejudice 29

TABLE OF CONTENTS—Continued

Page

II. A Test That Requires A Defendant To Prove Prejudice In The Presence Of An Appeal Waiver Is Impractical And Inefficient 33
A. The State's Rule Is Unworkable 34
B. The State's Rule Wastes Judicial Resources 37
Conclusion 44

TABLE OF AUTHORITIES

Page

CASES:

Anders v. *California*,
386 U.S. 738 (1967) 27, 28, 39

Ballweber v. *State*,
457 N.W.2d 215 (Minn. Ct. App. 1990) 34

Bookwalter v. *United States*,
No. 2:14-CR-82, 2018 WL 2407525
(E.D. Tenn. May 25, 2018) 40

Brookhart v. *Janis*,
384 U.S. 1 (1966) 24

Campusano v. *United States*,
442 F.3d 770 (2d Cir. 2006) 18, 19

Ceasar v. *United States*,
No. 2:17-cv-308-FtM-38MRM, 2018 WL
1964197 (M.D. Fla. Apr. 26, 2018) 40

Class v. *United States*,
138 S. Ct. 798 (2018) 21

Coleman v. *Thompson*,
501 U.S. 722 (1991) 29, 38

Devine v. *United States*,
520 F.3d 1286 (11th Cir. 2008) 41

Evitts v. *Lucey*,
469 U.S. 387 (1985) 10

Faretta v. *California*,
422 U.S. 806 (1975) 26

Ferrier v. *State*,
25 P.3d 110 (Idaho 2001) 3

Florida v. *Nixon*,
543 U.S. 175 (2004) 24

Gonzalez v. *United States*,
553 U.S. 242 (2008) 23, 24

TABLE OF AUTHORITIES—Continued

Page

Gonzalez v. *United States*,
No. 08-10223-PBS, 2012 WL 5471799
(D. Mass. Nov. 8, 2012) 40

Gonzalez v. *United States*,
No. 5:10-CR-00172-F-1, 2015 WL 5797628
(E.D.N.C. Oct. 1, 2015) 40

Haines v. *Kerner*,
404 U.S. 519 (1972) 37

In re Sealed Case,
702 F.3d 59 (D.C. Cir. 2012) 35

Jackson v. *Attorney Gen. of Nevada*,
268 F. App'x 615 (9th Cir. 2008) 41

Johnson v. *United States*,
No. 5:16-CR-81-D-1, 2018 WL 1734920
(E.D.N.C. Mar. 14, 2018), *report and recommendation adopted*, 2018 WL 1733983
(E.D.N.C. Apr. 9, 2018) 41

Jones v. *Barnes*,
463 U.S. 745 (1983) 13, 23, 24

Lafler v. *Cooper*,
566 U.S. 156 (2012) 10

Lee v. *United States*,
137 S. Ct. 1958 (2017) ..... *passim*

Mays v. *United States*,
No. 3:12-cr-110-J-34JRK, 2018 WL 3301895
(M.D. Fla. July 5, 2018) 42

McCoy v. *Louisiana*,
138 S. Ct. 1500 (2018) ..... *passim*

Moya v. *United States*,
No. 5:15-CR-064-01-C, 2018 WL 3039340
(N.D. Tex. May 30, 2018), *report and recommendation adopted*, 2018 WL 3038513 (June 19, 2018) 42

TABLE OF AUTHORITIES—Continued

Page

Nunez v. *United States*,
546 F.3d 450 (7th Cir. 2008) 25

Pabon v. *Wright*,
459 F.3d 241 (2d Cir. 2006) 37

Parsons v. *United States*,
505 F.3d 797 (8th Cir. 2007) 41

Peguero v. *United States*,
526 U.S. 23 (1999) 12, 15, 24, 30

Penson v. *Ohio*,
488 U.S. 75 (1988) 10, 27, 28, 39

Perez v. *United States*,
No. 3:12-CR-0133-N (01), 2016 WL 4276006
(N.D. Tex. May 31, 2016), *report and recommendation adopted*, 2016 WL 4268927 (Aug. 15, 2016) 42

Rodriquez v. *United States*,
395 U.S. 327 (1969) ..... *passim*

Roe v. *Flores-Ortega*,
528 U.S. 470 (2000) ..... *passim*

Smith v. *Robbins*,
528 U.S. 259 (2000) 27

Spear v. *United States*,
No. 3:12-CR-0323-D, 2015 WL 9583525
(N.D. Tex. Nov. 18, 2015), *report and recommendation adopted*, 2015 WL 9489569
(Dec. 30, 2015) 42

State v. *Allen*,
141 P.3d 1136 (Idaho Ct. App. 2006) 17

State v. *Cope*,
No. 29691, 2005 WL 783356
(Idaho Ct. App. Apr. 8, 2005) 17

TABLE OF AUTHORITIES—Continued

Page

State v. *Cope*,
129 P.3d 1241 (Idaho 2006) 4, 17

State v. *Eger*,
155 P.3d 784 (N.M. Ct. App. 2007) 34

State v. *Holdaway*,
943 P.2d 72 (Idaho Ct. App. 1997) 17

State v. *Kelchner*,
936 P.2d 680 (Idaho 1997) 21

State v. *Loye*,
670 N.W.2d 141 (Iowa 2003) 34

State v. *McKenney*,
568 P.2d 1213 (Idaho 1977) 27, 39

State v. *Murphy*,
872 P.2d 719 (Idaho 1994) 4, 17

State v. *Rodriguez*,
No. 45233, 2018 WL 700168
(Idaho Ct. App. Feb. 5, 2018) 17

State v. *Sainz*,
526 A.2d 1015 (N.J. 1987) 34

State v. *Straub*,
292 P.3d 273 (Idaho 2013) 17, 35

State v. *Taylor*,
336 P.3d 302 (Idaho Ct. App. 2014) 17

Stolkner v. *United States*,
No. 2:15-cr-00143-JDL-1, 2018 WL 3212007
(D. Me. June 29, 2018) 40

Strickland v. *Washington*,
466 U.S. 668 (1984) ..... *passim*

United States v. *Andis*,
333 F.3d 886 (8th Cir. 2003) 19

United States v. *Banks*,
776 F.3d 87 (2d Cir. 2015) 18

TABLE OF AUTHORITIES—Continued

Page

United States v. *Binkholder*,
832 F.3d 923 (8th Cir. 2016) 18

United States v. *Brown*,
892 F.3d 385 (D.C. Cir. 2018) 17

United States v. *Burden*,
860 F.3d 45 (2d Cir. 2017) 32

United States v. *Calderon*,
665 F. App'x 356 (5th Cir. 2016) 42

United States v. *Chaney*,
581 F.3d 1123 (9th Cir. 2009) 18

United States v. *Cervantes*,
132 F.3d 1106 (5th Cir. 1998) 19

United States v. *Cronic*,
466 U.S. 648 (1984) ..... *passim*

United States v. *Dunlap*,
No. 10-190, 2010 WL 4614557
(W.D. Pa. Nov. 5, 2010) 37

United States v. *Freeman*,
640 F.3d 180 (6th Cir. 2011) 19

United States v. *Goodson*,
544 F.3d 529 (3d Cir. 2008) 18

United States v. *Guillen*,
561 F.3d 527 (D.C. Cir. 2009) 19

United States v. *Hahn*,
359 F.3d 1315 (10th Cir. 2004) 19, 38

United States v. *Hampton*,
732 F.3d 687 (6th Cir. 2013) 18

United States v. *Hardman*,
778 F.3d 896 (11th Cir. 2014) 17

United States v. *Hunt*,
843 F.3d 1022 (D.C. Cir. 2016) 18, 31

TABLE OF AUTHORITIES—Continued

Page

United States v. *Johnson*,
410 F.3d 137 (4th Cir. 2005) 19

United States v. *Johnson*,
541 F.3d 1064 (11th Cir. 2008) 35

United States v. *Khattak*,
273 F.3d 557 (3d Cir. 2001) 19

United States v. *Kieffer*,
794 F.3d 850 (7th Cir. 2015) 18

United States v. *Lee*,
888 F.3d 503 (D.C. Cir. 2018) 31

United States v. *Litos*,
847 F.3d 906 (7th Cir. 2017) 19

United States v. *Lopez*,
655 F. Supp. 2d 720 (E.D. Ky. 2009) 34

United States v. *Mabry*,
536 F.3d 231 (3d Cir. 2008) 37

United States v. *Maggio*,
862 F.3d 642 (8th Cir. 2017) 18

United States v. *May*,
855 F.3d 271 (4th Cir. 2017) 18

United States v. *Oladimeji*,
463 F.3d 152 (2d Cir. 2006) 35

United States v. *Orosco*,
219 F. App'x 673 (9th Cir. 2007) 41

United States v. *Ortega-Hernandez*,
804 F.3d 447 (D.C. Cir. 2015) 18

United States v. *Phillips*,
174 F.3d 1074 (9th Cir. 1999) 19

United States v. *Puentes-Hurtado*,
794 F.3d 1278 (11th Cir. 2015) 18

TABLE OF AUTHORITIES—Continued

Page

United States v. *Quiñones-Meléndez*,
791 F.3d 201 (1st Cir. 2015) 18

United States v. *Ready*,
82 F.3d 551 (2d Cir. 1996) 17, 18

United States v. *Riggi*,
649 F.3d 143 (2d Cir. 2011) 19

United States v. *Rosa*,
123 F.3d 94 (2d Cir. 1997) 18

United States v. *Ruiz*,
536 U.S. 622 (2002) 21

United States v. *Story*,
439 F.3d 226 (5th Cir. 2006) 18

United States v. *Tapp*,
491 F.3d 263 (5th Cir. 2007) 35

United States v. *Teeter*,
257 F.3d 14 (1st Cir. 2001) 19

United States v. *Valnor*,
451 F.3d 744 (11th Cir. 2006) 18

United States v. *Washington*,
588 F. App'x 586 (9th Cir. 2014) 41

United States v. *White*,
584 F.3d 935 (10th Cir. 2009) 18

United States v. *Worden*,
646 F.3d 499 (7th Cir. 2011) 35, 36

Watson v. *United States*,
493 F.3d 960 (8th Cir. 2007) 38

Weaver v. *Massachusetts*,
137 S. Ct. 1899 (2017) 26

Weems v. *United States*,
No. C17-1023RSL, 2018 WL 1470877
(W.D. Wash. Mar. 26, 2018) 41

TABLE OF AUTHORITIES—Continued

Page

Zanuccoli v. *United States*,
459 F. Supp. 2d 109 (D. Mass. 2006) 40

CONSTITUTIONAL PROVISION:

U.S. Const. amend. VI ..... *passim*

STATUTE:

28 U.S.C. § 1257 3

RULES:

Fed. R. App. P. 11(g) 38

Fed. R. App. P. 27 39

Idaho App. R. 32(a) 38

Idaho Crim. R. 11(d)(3) 32

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U.S. Dep't of Justice, Criminal Resource Manual § 626 ..... 20, 34

U.S. Dep't of Justice, U.S. Attorneys' Manual §§ 9-16.330, 9-16.331 (2017) 20, 34

IN THE

Supreme Court of the United States

GILBERTO GARZA, JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Writ of Certiorari to the
Supreme Court of Idaho

BRIEF FOR PETITIONER

INTRODUCTION

In *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), this Court held that when an attorney "disregards specific instructions from the defendant to file a notice of appeal," the attorney has rendered deficient representation, and the defendant should be "presum[ed]" to have suffered prejudice. *Id.* at 477, 482. Three reasons buttressed that unanimous holding. The attorney's failure to perfect an appeal causes the "forfeiture" of the entire proceeding. *Id.* at 483. It wrests from the defendant a "fundamental decision" entrusted to him alone: the decision whether to take an appeal. *Id.* at 477. And it would be unfair to require an "indigent, perhaps *pro se*, defendant" to "specify the points he would raise were his right to

appeal reinstated" in order to establish prejudice. *Id.* at 486.

Flores-Ortega arose in the context of an appeal following the defendant's guilty plea. In the years since, the great majority of circuits—eight, to respondent's two—have held that its rule applies with equal force where a defendant enters a guilty plea containing an appeal waiver. The minority view, adopted by the Idaho courts below, strips away the presumption of prejudice in those circumstances, requiring defendants to first demonstrate the merits of the claims they *would* have brought had their attorneys followed the instructions to appeal.

The majority has the better approach. An "appeal waiver" does not waive all rights to appeal. Even the broadest appeal waivers are interpreted to preserve a client's right to appeal certain fundamental claims of error, among them a challenge to the voluntariness of the guilty plea; a claim that the government has breached the plea agreement; and a disagreement about the waiver's scope. Consequently, an attorney who disregards his client's instruction to appeal following a plea containing an appeal waiver still "forfeits a proceeding" to which the defendant is entitled; he still wrests from his client the "fundamental decision" whether to appeal; and he still forces the defendant into the "unfair" situation of needing to demonstrate on his own that his appeal would have merit. Appeal waiver or no, the holding and logic of *Flores-Ortega* apply with full force.

OPINIONS BELOW

The Supreme Court of Idaho's opinion (Pet. App. 1a-15a) is published at 405 P.3d 576. The opinion of the Court of Appeals of Idaho (Pet. App. 16a-27a) is

unpublished, but available at 2017 WL 444026. The district court's opinion (Pet. App. 28a-39a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on November 6, 2017. Petitioner timely filed a certiorari petition on January 23, 2018, which this Court granted on June 18, 2018. The Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

STATEMENT

1. In early 2015, Gilberto Garza, Jr., entered into two plea agreements in Idaho state court: an *Alford* plea to aggravated assault, and a guilty plea to possession of a controlled substance.[1] Each plea agreement stipulated to a proposed sentence for the offense. Pet. App. 40a-41a, 46a-47a. Each agreement also contained a provision stating that Mr. Garza "waives his right to appeal." *Id.* at 44a, 49a.

Under Idaho law, such a provision (commonly known as an "appeal waiver"), combined with the guilty plea itself, barred Mr. Garza from raising

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[1] Because the district court disposed of this case on summary judgment, all facts are viewed in the light most favorable to Mr. Garza. *Ferrier* v. *State*, 25 P.3d 110, 112 (Idaho 2001).

many claims on appeal. But not all of them. The Idaho Supreme Court, like every federal court of appeals, has held that a defendant who signs an appeal waiver nevertheless retains the right to appeal his conviction or sentence on certain grounds—for example, that he did not knowingly, intelligently, and voluntarily consent to the plea agreement or to the provision waiving his right to appeal. *State* v. *Cope*, 129 P.3d 1241, 1244-47 (Idaho 2006); *State* v. *Murphy*, 872 P.2d 719, 720 (Idaho 1994). In other words, in Idaho (and elsewhere), an "appeal waiver" never operates as a *total* appeal waiver.

Indeed, during his plea proceeding and sentencing, Mr. Garza indicated that he did not believe that he was waiving all of his appeal rights, and the district court repeatedly advised him as much. In February 2015, Mr. Garza completed a Guilty Plea Advisory Form that asked, "Have you waived your right to appeal your judgment of conviction and sentence as part of your plea agreement?" CR 97.[2] Mr. Garza answered "No." *Id.* During a subsequent plea and sentencing hearing, the judge noted that Mr. Garza's plea agreements contained an appeal waiver, but advised Mr. Garza: "[Y]ou have the right to appeal, and if you cannot afford an attorney, you can request to have one appointed at public expense." CR 132. In the judgment for each offense, the court similarly advised that "[y]ou, Gilberto Garza, Jr., are hereby notified that you have the right to appeal this order to the Idaho Supreme Court," and "you have the

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[2] "CR" refers to the record on file with the Idaho Supreme Court.

right to be represented by an attorney in any appeal." CR 118, 121.

Consistent with this advice, Mr. Garza informed his attorney shortly after entry of his judgment of conviction and sentence that he wished to appeal. Pet. App. 3a. Mr. Garza repeated that instruction in "numerous phone calls and letters." *Id.* Nonetheless, Mr. Garza's attorney declined to file a notice of appeal. *Id.* In the attorney's view, an appeal would have been "problematic," given that Mr. Garza had "waived his right to appeal." *Id.* at 52a.

2. "Thus, no appeals were filed, despite Garza's expressed desire to file them." *Id.* at 29a. Mr. Garza promptly filed a *pro se* petition for postconviction relief. In it, he asserted that his trial counsel rendered ineffective assistance by disregarding his instruction to file a notice of appeal. *Id.* at 30a; *see also* CR 10, 31. Mr. Garza further argued that he did not "knowingly" and "voluntarily" "plead guilty," and that he had entered an "involuntary plea." CR 6, 10.

The district court granted summary judgment in favor of the State. The court began by noting that, under *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), an attorney renders ineffective assistance if he engages in "objectively unreasonable" conduct that prejudices the defendant. Pet. App. 33a. It further explained that in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), this Court held that "trial counsel's failure to file an appeal at a criminal defendant's request is deficient performance that prejudices the defendant, irrespective of whether the appeal has merit." Pet. App. 33a-34a. The district court acknowledged that, since *Flores-Ortega*, eight federal circuits had concluded that the *Flores-Ortega* rule

applies "even if the defendant ha[s] validly waived the right to appeal." *Id.* at 35a. And under that "majority rule," there was no question that Mr. Garza would prevail: It was undisputed that he expressly instructed his attorney to file a notice of appeal, and that his attorney refused to do so. *Id.* at 33a, 35a.

The district court, however, sided with the two circuits that hold the *Flores-Ortega* rule does not apply when a defendant has signed an appeal waiver. *Id.* at 35a-36a. Under that approach, such a waiver removes the presumption of prejudice that *Flores-Ortega* otherwise demands: a defendant who has signed an appeal waiver instead must first "show prejudice" from an attorney's failure to appeal, *id.* at 37a (emphasis in original), by identifying "non-frivolous" arguments he would raise on direct appeal, *id.* at 38a. The district court found that Mr. Garza's petition failed to make that showing. His claim that the pleas were involuntary, the court reasoned, lacked sufficient "factual support," and Mr. Garza had marshaled "no evidence" that the State breached the plea agreements or that his intended appeals were outside their scope. *Id.* The court accordingly dismissed the petition. *Id.* at 39a.

3. The Idaho Court of Appeals affirmed. *Id.* at 27a. Like the district court, it sided with the two-circuit minority view. *Id.* at 25a. Thus, it held, Mr. Garza was required at the postconviction stage to "make a showing of prejudice with evidence that the waiver was invalid or unenforceable or that the claimed issues on appeal were outside the scope of the waiver." *Id.* at 27a. Under the heightened pleading standard Idaho applies to postconviction proceedings, the petition's factual allegations therefore

would need to be "verified" and "accompanied by admissible evidence supporting [the] allegations," or it would be subject to "summary dismissal." *Id.* at 18a-19a. The court of appeals found that Mr. Garza had not made this demanding showing. *Id.* at 27a.

4. The Supreme Court of Idaho affirmed. *Id.* at 5a. Recognizing that it was departing from the majority view, it held "that *Flores-Ortega* does not require counsel be presumed ineffective for failing to appeal at the client's direction in situations where there has been a waiver of the right to appeal." *Id.* at 10a. As the court saw it, "[o]nce a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal." *Id.* at 11a. Furthermore, it added, "[i]f an attorney files an appeal despite a waiver in the plea agreement, the agreement may be breached, and the State may now be entitled to disregard the plea in its entirety." *Id.* at 14a. The court reasoned that, by refusing his client's express instruction to file a notice of appeal, an attorney "ensured [the client] would not be in breach of the plea." *Id.*

Like the lower courts, the Idaho Supreme Court thus held that Mr. Garza could prevail only by showing "resulting prejudice" from losing his direct appeal, by identifying "non-frivolous grounds for appeal." *Id.* at 15a. Because Mr. Garza did not make that showing, the Idaho Supreme Court affirmed the judgment of dismissal. *Id.*

SUMMARY OF ARGUMENT

The *Flores-Ortega* rule applies where an attorney has disregarded his client's express instruction to appeal—no matter the particulars of the judgment or plea from which that appeal is taken. By its terms,

the *Flores-Ortega* rule is categorical. It brooks no exceptions for appellate waivers. And all three rationales underpinning the rule hold equally fast where a defendant has signed an appeal waiver.

First, an attorney's refusal to follow instructions to file a notice of appeal following an appeal waiver results in "the forfeiture of a proceeding" to which the defendant is entitled. *Flores-Ortega*, 528 U.S. at 483. It is immaterial that an appeal waiver diminishes the number of claims a defendant may bring, or that his chances of success on appeal may be low. *Flores-Ortega* itself involved a defendant who entered a guilty plea, which necessarily "reduce[d] the scope of potentially appealable issues." *Id.* at 480. And this Court has explained more than once that when a lawyer's unreasonable conduct causes the forfeiture of a judicial proceeding, prejudice is presumed even if the defendant has shown "no plausible chance" of success in the proceeding he was denied. *Lee* v. *United States*, 137 S. Ct. 1958, 1966-67 (2017); *Flores-Ortega*, 528 U.S. at 484-485.

Second, an attorney who overrules his client's decision to "take an appeal" usurps the defendant's right to make that "fundamental decision" about his defense. *Flores-Ortega*, 528 U.S. at 477; *see McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1508 (2018). A defendant who signs an appeal waiver as part of a plea agreement retains the autonomy to decide for himself whether to pursue an appeal in which he can raise any claims preserved by the waiver. And it is the defendant's autonomous right to decide whether to risk the consequences of being found in breach of his plea agreement if he appeals an issue that is deemed waived.

Third, just as in *Flores-Ortega*, it would be "unfair" to require an indigent, usually *pro se* defendant to specify the grounds he wishes to appeal in order to establish that his attorney rendered ineffective assistance. 528 U.S. at 486. There is no right to counsel in habeas proceedings, and *pro se* defendants will generally have difficulty identifying and supporting preserved appellate claims without the assistance of an attorney. A defendant should not be penalized with the loss of a counseled appeal merely because he cannot articulate the claims he might have pursued with the assistance of counsel.

The State's contrary rule, which strips the presumption of prejudice where the defendant has signed an appeal waiver, is unworkable and inefficient. *Some* narrowing of claims on appeal plainly does not extinguish the presumption; the *Flores-Ortega* rule was announced in the context of an appeal from a guilty plea, which greatly reduces the scope of appellate claims even without an express waiver. Courts therefore will face an intractable line-drawing problem in determining when a plea agreement waives a sufficient number of claims to trigger the denial of the presumption of prejudice, a challenge made all the more difficult because appeal waivers come in all shapes and sizes. The State's rule also would waste judicial resources by forcing the defendant to preview his merits case before the habeas court, almost always without the benefit of counsel. It is far more practical and efficient to presume prejudice whenever a lawyer disregards an instruction to appeal. That enables a single court to resolve the merits of the defendant's appeal, with the assistance of counsel, and with the benefit of established procedures—including summary disposition

and the *Anders* process—for quickly disposing of frivolous appeals.

The Idaho Supreme Court's judgment should be reversed.

ARGUMENT

I. The Presumption Of Prejudice Applies When An Attorney Fails To Notice An Appeal At The Direction Of A Defendant Who Has Signed An Appeal Waiver.

A. Under *Roe* v. *Flores-Ortega*, Prejudice Is Presumed If An Attorney Disregards An Instruction To File A Notice Of Appeal.

The Sixth Amendment guarantees to every criminal defendant "the right * * * to have the assistance of counsel for his defence." This provision requires that a defendant receive the assistance of counsel at " 'critical stages of a criminal proceeding,' including when he enters a guilty plea," *Lee* v. *United States*, 137 S. Ct. 1958, 1964 (2017), at sentencing, *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984), and on appeal, *Lafler* v. *Cooper*, 566 U.S. 156, 165 (2012). As the Court has explained, "[t]he need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage." *Penson* v. *Ohio*, 488 U.S. 75, 85 (1988). In appellate proceedings, no less than at trial, "careful advocacy" is required "to ensure that rights are not forgone," that "substantial legal and factual arguments are not inadvertently passed over," and that a defendant is not left unrepresented when " 'fac[ing] an adversary proceeding.' " *Id.* (quoting *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985)).

The constitutional right to assistance of counsel requires, of course, *effective* counsel. *United States* v. *Cronic*, 466 U.S. 648, 653-654 (1984). In *Strickland*, this Court set forth a two-part test to determine whether an attorney has rendered ineffective assistance in derogation of a defendant's Sixth Amendment right. Under that test, an attorney's conduct is deemed constitutionally ineffective if it was both "professionally unreasonable" and "prejudicial to the defense." 466 U.S. at 691-692.

Typically, a defendant bears the burden of showing that he suffered prejudice, by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 693-694. But "[i]n certain Sixth Amendment contexts, prejudice is presumed." *Id.* at 692; *see Cronic*, 466 U.S. at 658-659. For instance, an error is "legally presumed to result in prejudice" where it entails the "[a]ctual or constructive denial of the assistance of counsel altogether." *Strickland*, 466 U.S. at 692. That is because the Court "presum[es] that counsel's assistance is essential," and a trial is necessarily "unfair if the accused is denied counsel at a critical stage." *Cronic*, 466 U.S. at 659. Likewise, a defendant need not "show prejudice" where his counsel has "usurp[ed] control of an issue within [the defendant's] sole prerogative," thereby "block[ing] the defendant's right to make the fundamental choices about his own defense." *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1511 (2018).

In *Roe* v. *Flores-Ortega*, the Court held that prejudice should also be presumed where an attorney has "deprive[d] a defendant of an appeal that he otherwise would have taken." 528 U.S. 470, 484 (2000). Lucio Flores-Ortega pleaded guilty to a murder

charge, and his attorney failed to file a timely notice of appeal. *Id.* at 473-474. Mr. Flores-Ortega subsequently filed a petition for habeas relief, contending that his attorney had violated his Sixth Amendment rights by not consulting with him before failing to file the notice. *Id.* at 474.

The Court explained that to make out his ineffective-assistance claim under *Strickland*, Mr. Flores-Ortega was required to show, first, that it was professionally unreasonable for his attorney to fail to consult with him about filing an appeal, *id.* at 479-480; and second, that there was "a reasonable probability that, but for counsel's deficient failure to consult * * *, he would have timely appealed," *id.* at 484. Both showings in the failure-to-consult context—deficient performance, and prejudice—require consideration of several "relevant factors" that shed light on whether "this particular defendant" or "a rational defendant" in the defendant's shoes "would want to appeal." *Id.* at 480.

At the same time, the Court made clear that where a defendant has *instructed* his attorney to appeal, "the question of deficient performance is easily answered." *Id.* at 478. The Court has "long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.* at 477 (citing *Rodriquez* v. *United States*, 395 U.S. 327 (1969); *Peguero* v. *United States*, 526 U.S. 23, 28 (1999)). "This is so," the Court explained, "because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice" and counsel's disregard for his client's choice to challenge his conviction or sentence "cannot be considered a strategic decision." *Id.*

Where a defendant has demonstrated that he directed his attorney to file a notice of appeal, the Court went on, prejudice should be presumed without any "further showing from the defendant of the merits of his underlying claims." *Id.* at 484. The Court grounded that determination in three rationales.

First, an attorney's failure to follow her client's instruction "deprive[s] [the defendant] of * * * an appeal." *Id.* at 483. Courts presume prejudice when counsel abandons her client at a critical stage of a proceeding, because counsel's absence means that "the adversary process itself [is] presumptively unreliable." *Id.* (quoting *Cronic*, 466 U.S. at 659). An attorney's failure to file a notice of appeal deprives a defendant "of more than a *fair* judicial proceeding"; it "deprive[s] [him] of the appellate proceeding altogether." *Id.* That "even more serious denial of the entire judicial proceeding * * * demands a presumption of prejudice." *Id.* "Put simply," the Court explained, "we cannot accord any presumption of reliability to judicial proceedings that never took place." *Id.* (citation and quotation marks omitted)

Second, "the decision whether to appeal * * * rest[s] with the defendant," not counsel. *Id.* at 485. When counsel "disregards specific instructions from the defendant to file a notice of appeal," she usurps the defendant's "ultimate authority" to make this " 'fundamental decision.' " *Id.* at 477 (citing *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983)). Accordingly, courts must grant a defendant a "new appeal without any further showing" if a defendant "has objectively indicated his intent to appeal" and the attorney has " 'frustrated' " that intention. *Id.* at 485 (quoting *Rodriquez*, 395 U.S. at 330).

Third, the Court explained that it would be "unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate" prejudice, "before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." *Id.* at 486. A defendant whose lawyer follows his instruction is permitted to proceed with his appeal, and receives the assistance of counsel in doing so, regardless of the appeal's merit; a defendant whose lawyer ignores his instruction should be afforded the same right. *Id.*

Each of these rationales pointed to the same conclusion for the *Flores-Ortega* Court: Where an attorney disregards her client's instruction to appeal, the client is entitled to the appellate proceeding he would otherwise have had, without being required first to " 'specify the points he would raise were his right to appeal reinstated.' " *Id.* at 485 (quoting *Rodriquez*, 395 U.S. at 330).

B. This Court Should Not Create An Exception For Cases In Which A Defendant Has Signed An Appeal Waiver.

Flores-Ortega provides that a defendant is entitled to a presumption of prejudice when his attorney disregards his express instruction to appeal. That rule resolves this case. Both the opinion's language and its logic make clear that it applies with equal force where a defendant has entered a plea containing an appeal waiver.

To start, the language of the Court's opinion was categorical. The *Flores-Ortega* Court held that where an attorney "fail[s] to file a notice of appeal, despite being instructed by the defendant to do so," the defendant is "entitled to a new appeal *without*

any further showing." 528 U.S. at 485 (emphasis added); *see id.* at 477 (same). That rule is unequivocal and unconditional. It does not depend on whether the defendant was convicted after a full trial or entered an *Alford* plea or pled guilty, nor on the particulars of his plea.

The Court also did not simply overlook appeal waivers; to the contrary, it made clear that an appeal waiver should be considered elsewhere in the *Strickland* inquiry. The Court explained that, where an attorney fails to consult with his client as to whether to file an appeal, one "relevant factor" in determining whether the client would have wished to appeal had he been consulted is whether he "waived some or all appeal rights." *Id.* at 480. The existence of an appeal waiver is accordingly relevant in inferring the client's wishes where he is silent. But the Court gave no comparable indication that a waiver is relevant where it has been established that a client gave "specific instructions * * * to file a notice of appeal." *Id.* at 477-478. In that circumstance, the Court stated only that where an attorney "fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit." *Id.* (alteration in original) (quoting *Peguero*, 526 U.S. at 28).

Just as important as *Flores-Ortega*'s language is its tripartite logic: *All three* rationales the Court offered in support of a presumption of prejudice apply where a defendant gives an instruction to appeal after signing an appeal waiver. By declining to file an appeal at his client's direction, an attorney forfeits his client's right to an appellate proceeding in which the defendant could bring the numerous claims that survive an appeal waiver—including the right to

challenge the validity, scope, and enforceability of the waiver. The attorney also usurps his client's autonomous right to decide whether to lodge an appeal. And requiring a defendant to show that his hypothetical claims have merit *before* obtaining the right to a counseled appeal—as the State's rule would require—would be profoundly unfair to indigent, *pro se* defendants.

1. An attorney's failure to file an appeal at the direction of his client results in the forfeiture of an entire proceeding.

The *Flores-Ortega* Court's first rationale for applying a presumption of prejudice was that an attorney's failure to appeal at his client's instruction results in "the forfeiture of [the appellate] proceeding itself." *Flores-Ortega*, 528 U.S. at 483. That rationale applies with full force to a defendant who has signed an appeal waiver: The presence of that waiver does not alter the fact that the lawyer's conduct deprives the client of "an appeal altogether." *Id.*

a. Defendants who sign even the broadest appeal waivers nevertheless retain the right to appeal a number of fundamental issues concerning the validity, scope, and enforceability of their plea agreement and waiver.[3] Idaho, the jurisdiction in which Mr. Garza's case arose, is typical: Defendants who waive appellate rights still have a right to bring an appeal challenging whether the plea agreement as a whole or the appellate waiver in particular was entered

[3] This discussion assumes that appeal waivers uniformly set out a categorical waiver of the right to appeal. In fact, as discussed *infra* pp. 34-36, appeal waivers vary greatly, in terms of both scope and form.

into "voluntarily, knowingly, and intelligently." *State* v. *Cope*, 129 P.3d 1241, 1246 (Idaho 2006); *State* v. *Murphy*, 872 P.2d 719, 720 (Idaho 1994). An Idaho defendant is also entitled to bring an appeal alleging that particular issues fall outside the waiver's scope, a determination that must be made on a case-by-case basis. *State* v. *Straub*, 292 P.3d 273, 276-277 (Idaho 2013); *see State* v. *Taylor*, 336 P.3d 302, 305 (Idaho Ct. App. 2014) (collecting cases). And an Idaho defendant may bring an appeal alleging that the government has either breached the plea agreement or declined to enforce it. *Cope*, 129 P.3d at 1244, 1248; *see State* v. *Allen*, 141 P.3d 1136, 1139 (Idaho Ct. App. 2006); *State* v. *Rodriguez*, No. 45233, 2018 WL 700168, at *1 n.1 (Idaho Ct. App. Feb. 5, 2018) (per curiam).[4]

The federal courts of appeals, too, unanimously recognize that a defendant who has signed an appeal waiver retains his right to challenge whether the agreement was knowing and voluntary,[5] whether a claim is outside its scope,[6] and whether the govern-

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[4] Idaho courts also allow defendants to appeal in order to argue that their sentences exceed the statutory maximum, *State* v. *Cope*, No. 29691, 2005 WL 783356, at *5 (Idaho Ct. App. Apr. 8, 2005), *aff'd*, 129 P.3d 1241 (2006), or that subsequent events or new information have rendered their sentences "plainly unjust," *State* v. *Holdaway*, 943 P.2d 72, 75 (Idaho Ct. App. 1997).

[5] *See United States* v. *Brown*, 892 F.3d 385, 394-396 (D.C. Cir. 2018) (noting that "[l]ike all other courts of appeals," the D.C. Circuit enforces a waiver only if it is "knowing, intelligent, and voluntary"); *United States* v. *Ready*, 82 F.3d 551, 556 (2d Cir. 1996) (same).

[6] *See United States* v. *Hardman*, 778 F.3d 896, 899 & n.2 (11th Cir. 2014) ("All eleven of our sister circuits with criminal jurisdiction agree" that even a valid appeal waiver "only

ment has breached the agreement[7] or declined to enforce it.[8] *See United States* v. *Rosa*, 123 F.3d 94, 98 (2d Cir. 1997) ("[N]o circuit has held that these contractual waivers are enforceable on a basis that is unlimited and unexamined." (quoting *United States* v. *Ready*, 82 F.3d 511, 555 (2d Cir. 1996))). In addition, courts generally agree that "important constitutional rights require some exceptions to the presumptive enforceability of [an appeal] waiver." *Campusano* v. *United States*, 442 F.3d 770, 774 (2d

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precludes challenges that fall within its scope"); *United States* v. *Binkholder*, 832 F.3d 923, 926 (8th Cir. 2016) (stating that courts enforce an appeal waiver only if "a given appeal is clearly and unambiguously within [its] scope"); *United States* v. *Hunt*, 843 F.3d 1022, 1027 (D.C. Cir. 2016) ("[W]e will not bar the door to a criminal defendant's appeal if his waiver only arguably or ambiguously forecloses his claims.").

[7] *See United States* v. *Puentes-Hurtado*, 794 F.3d 1278, 1281 (11th Cir. 2015) (noting that "like the rest of [its] sister circuits," the Eleventh Circuit holds that a claim that the government breached the plea agreement is not barred by an appeal waiver).

[8] *See, e.g.*, *United States* v. *Goodson*, 544 F.3d 529, 533-537 (3d Cir. 2008) (An appellate waiver has "no bearing on an appeal if the government does not invoke its terms."); *see also United States* v. *Ortega-Hernandez*, 804 F.3d 447, 449 (D.C. Cir. 2015); *United States* v. *Quiñones-Meléndez*, 791 F.3d 201, 203 n.1 (1st Cir. 2015); *United States* v. *Banks*, 776 F.3d 87, 88 n.1 (2d Cir. 2015) (per curiam); *United States* v. *May*, 855 F.3d 271, 274 (4th Cir. 2017); *United States* v. *Story*, 439 F.3d 226, 231 (5th Cir. 2006) *United States* v. *Hampton*, 732 F.3d 687, 690 (6th Cir. 2013); *United States* v. *Kieffer*, 794 F.3d 850, 852 (7th Cir. 2015) (per curiam); *United States* v. *Maggio*, 862 F.3d 642, 646 (8th Cir. 2017); *United States* v. *Chaney*, 581 F.3d 1123, 1124 n.1 (9th Cir. 2009); *United States* v. *White*, 584 F.3d 935, 947 n.5 (10th Cir. 2009); *United States* v. *Valnor*, 451 F.3d 744, 745 n.1 (11th Cir. 2006).

Cir. 2006) (Sotomayor, J.). Courts have held, for example, that an appeal waiver does not prevent a defendant from bringing claims alleging a "miscarriage of justice," *United States* v. *Teeter*, 257 F.3d 14, 25 (1st Cir. 2001), or a deprivation of "a fundamental right," *United States* v. *Riggi*, 649 F.3d 143, 147 (2d Cir. 2011).[9]

The Department of Justice recognizes the same principle. It has instructed its attorneys that an appeal waiver "does not waive all claims on appeal," and that, "[f]or example":

> a defendant's claim that he or she was denied the effective assistance of counsel at sentencing; that he or she was sentenced on the basis of race; or that the sentence exceeded the statutory maximum, will be reviewed on the merits by a court of appeals despite the existence of a sentencing appeal waiver in a plea agreement.

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[9] Courts recognize, for instance, that notwithstanding an appeal waiver, a defendant can appeal to raise claims of ineffective assistance during the plea process or at sentencing, and can appeal the sentence on the ground that it exceeds the statutory maximum or was based on an impermissible consideration such as race. *See United States* v. *Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009); *Teeter*, 257 F.3d at 25-26; *Campusano*, 442 F.3d at 774-775; *United States* v. *Khattak*, 273 F.3d 557, 562 (3d Cir. 2001); *United States* v. *Johnson*, 410 F.3d 137, 151 (4th Cir. 2005); *United States* v. *Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998); *United States* v. *Freeman*, 640 F.3d 180, 193-194 (6th Cir. 2011); *United States* v. *Litos*, 847 F.3d 906, 910 (7th Cir. 2017); *United States* v. *Andis*, 333 F.3d 886, 891-892 (8th Cir. 2003) (en banc); *United States* v. *Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999); *United States* v. *Hahn*, 359 F.3d 1315, 1325, 1327 (10th Cir. 2004) (en banc) (per curiam).

U.S. Dep't of Justice, Criminal Resource Manual § 626 (citations omitted).[10]

In short, a defendant who signs an appeal waiver does not actually waive his *appeal*. Better put, he waives the right to bring certain claims on appeal, but retains the right to bring others.

b. When an attorney disregards his client's instruction to file a notice of appeal, the attorney thus "deprive[s]" the defendant "of a proceeding" in which to bring those claims. *Flores-Ortega*, 528 U.S. at 483. *Flores-Ortega* makes plain that such an error "mandates a presumption of prejudice." *Id.*

That presumption applies regardless of the kind or number of claims available to a defendant on appeal. When a defendant in Mr. Garza's position is denied a counseled appellate proceeding, he is deprived of an opportunity to be heard on questions fundamental to the integrity of the trial court's judgment, such as whether his plea was voluntary, whether the government honored its end of the bargain, and whether his plea or sentence was infected by some significant constitutional infirmity. These and other such claims fall outside an appeal waiver precisely *because* they are essential to ensuring the legitimacy of the judicial proceedings as a whole. The loss of a proceeding in which to bring them is plainly a "serious" deprivation, which may severely impact the

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[10] The Department of Justice also instructs federal prosecutors that they should "not seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel," including such claims "made on direct appeal" when permitted by circuit law. U.S. Dep't of Justice, U.S. Attorneys' Manual §§ 9-16.330, 9-16.331 (2017).

reliability of "the adversary process itself." *Id.* (quoting *Cronic*, 466 U.S. at 659); *see Lee*, 137 S. Ct. at 1965 (reaffirming this principle). And that deprivation is all the more severe because a direct appeal is typically the last proceeding in which a defendant is entitled to the assistance of counsel in pressing these claims. *See infra* p. 29.

To be sure, a defendant who has signed an appeal waiver usually will be constrained to a narrower set of appellate claims than other defendants, and his waiver may present an additional hurdle to success for certain issues that the government believes fall within its scope. But this Court has already made clear that neither of those considerations cancels out the presumption of prejudice.

For one thing, *Flores-Ortega* itself involved a guilty plea, which by its nature "reduces the scope of potentially appealable issues." 528 U.S. at 480. In the federal system, a guilty plea automatically bars the defendant from appealing "the constitutionality of case-related government conduct that takes place before the plea is entered" or raising any "claim that would contradict" the admission of guilt. *Class* v. *United States*, 138 S. Ct. 798, 805 (2018); *see United States* v. *Ruiz*, 536 U.S. 622, 629 (2002). Many states, including Idaho, hold that guilty pleas automatically forfeit an even broader set of claims. *See, e.g.*, *State* v. *Kelchner*, 936 P.2d 680, 682 (Idaho 1997) (explaining that the act of pleading guilty "constitutes a waiver of all non-jurisdictional defects"). Nonetheless, the *Flores-Ortega* Court had no difficulty concluding that an attorney's failure to appeal following a guilty plea entails "forfeiture of a proceeding *** to which [the defendant] had a right." *Flores-Ortega*, 528 U.S. at 483. There is no

reason to create some fine-grained exception to this rule where a guilty plea contains an appeal waiver; in both cases, the defendant retains a narrow but important set of issues that he may appeal.

As for a defendant's chance of success on the merits, this Court has repeatedly held that where a defendant is denied a proceeding altogether, the presumption of prejudice does *not* turn on the merits of that hypothetical proceeding. Thus, in *Flores-Ortega*, the Court held—"following the suggestion of the Solicitor General"—that where a defendant is deprived of the right to appeal, a court should "presum[e] prejudice with no further showing from the defendant of the merits of his underlying claims." *Id.* at 484-485. Similarly, in *Lee*, the Court held that where an attorney's deficient performance caused a defendant to accept a guilty plea he otherwise would have rejected, the defendant is entitled to a presumption of prejudice even if he "ha[s] no viable defense"—that is, even where the defendant faces "no plausible chance of acquittal" and rests his hopes on "throwing a 'Hail Mary' at trial." 137 S. Ct. at 1966-67. The dispositive consideration was simply whether the "defendant was deprived of a proceeding altogether"; if so, the defendant was entitled to restoration of the proceeding he lost, without regard to his "likelihood of success" in that forfeited proceeding. *Id.*; *see also McCoy*, 138 S. Ct. at 1506-09.

Here, it is undisputed that Mr. Garza repeatedly and specifically instructed his attorney to file an appeal. It is also undisputed that Mr. Garza's attorney refused to follow that instruction. Pet. App. 52a. Mr. Garza therefore suffered the deprivation of "the entire judicial proceeding" to which he was entitled;

under *Flores-Ortega*, that error "mandates a presumption of prejudice." 528 U.S. at 483.

2. An attorney's failure to file an appeal requested by his client usurps a decision committed to the client alone.

Flores-Ortega explained that a defendant whose attorney ignores an instruction to appeal is afforded a presumption of prejudice not just because the defendant is deprived of a proceeding, but also because his attorney has usurped a "decision" that "rest[s] with the defendant" alone: the decision to take an appeal. *Flores-Ortega*, 528 U.S. at 485; *see Barnes*, 463 U.S. at 751 (same). Such a violation of a defendant's "autonomy right," *McCoy*, 138 S. Ct. at 1511, is sufficient, by itself, to entitle a defendant to a new appeal without any further showing. And that violation of an autonomy right occurs any time an attorney overrides his client's decision to file an appeal, regardless of whether the client has been convicted, or pled guilty, or entered a plea with an appeal waiver.

a. An attorney for a criminal defendant has wide discretion to make "strategic choices about how best to *achieve* a client's objectives," including "'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" *Id.* at 1508 (quoting *Gonzalez* v. *United States*, 553 U.S. 242, 248 (2008)). But certain critical decisions are "reserved for the client," including the decision "whether to plead guilty" and the right to "decide * * * the objective of the defense." *Id.* When a client "expressly" instructs his attorney as to one of these matters, "his lawyer

must abide by that [decision] and may not override it." *Id.* at 1509.

If an attorney does override his client's decision, then the defendant may gain "redress" for that usurpation of a fundamental choice without satisfying the usual requirement to "show prejudice." *Id.* at 1511. That is because a violation of the client's "protected autonomy right [i]s complete" as soon as the attorney "usurp[s]" a matter within the client's "sole prerogative." *Id.*; *see also Gonzalez*, 553 U.S. at 254 (Scalia, J., concurring) (An "action taken by counsel over his client's objection" has the "effect of revoking the agency with respect to the action in question") (citing *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966)).

One of the matters over which the "accused has ultimate authority" is the "fundamental decision whether to take an appeal." *Flores-Ortega*, 528 U.S. at 477; *see id.* at 489 (Souter, J., concurring in part and dissenting in part) ("Where appeal is available as a matter of right, a decision to seek or forgo review is for the convict himself, not his lawyer."); *McCoy*, 138 S. Ct. at 1508 (The decision to "forgo an appeal" is "reserved for the client"); *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (same); *Barnes*, 463 U.S. at 751 (same). An attorney's failure to file a requested appeal therefore "entitle[s]" the defendant "to [a new] appeal without showing that his appeal would likely have had merit." *Flores-Ortega*, 528 U.S. at 477 (alteration in original) (quoting *Peguero*, 526 U.S. at 28); *see also id.* at 489 (Souter, J., concurring in part and dissenting in part) ("[A]s the majority notes," a counsel's failure to "file [a requested] appeal * * * is, without more, ineffective for constitutional purposes.").

b. That principle applies whether or not a defendant has signed an appeal waiver. A defendant who has signed an appeal waiver must still make the "fundamental decision whether to take an appeal." *Flores-Ortega*, 528 U.S. at 477. That decision is not preempted by the waiver itself because a defendant who has signed a waiver unquestionably retains the right to bring certain claims on appeal. *See supra* pp. 16-20. Indeed, the violation of a defendant's autonomy right is particularly severe in this context because an attorney's decision to ignore his client's instruction to appeal in the face of a waiver deprives the defendant of an opportunity to argue that he did not voluntarily plead guilty or waive his appellate rights. The attorney's error therefore not only usurps the defendant's liberty interest in deciding whether to appeal; it implicates his fundamental right to decide "whether to plead guilty" or "waive the right to a jury trial" in the first place. *McCoy*, 138 S. Ct. at 1508. It would be more than a little ironic if the defendant's trial attorney—who may himself have induced or permitted the defendant to unknowingly or involuntarily plead guilty—were allowed to unilaterally veto his client's decision to assert a claim to that effect.

The Idaho Supreme Court suggested that attorneys should be permitted to override their client's decision to appeal because doing so may "cost their client the benefit of the plea bargain." Pet. App 14a; *see Nunez* v. *United States*, 546 F.3d 450, 455 (7th Cir. 2008). That gets things backwards. Like any party to a contract, a defendant must be permitted to decide whether and how to comply with his plea agreement, and whether he is willing to tolerate the consequences if he is found in breach. The fact that the decision

to appeal in the face of a waiver may have grave consequences for the client, including the potential rescission of the plea agreement, means that it is all the more important that the defendant "be free personally to decide" whether to "bear the personal consequences" of that decision. *Faretta* v. *California*, 422 U.S. 806, 834 (1975). The defendant, not the lawyer, has the right "to decide * * * the objective of the defense." *McCoy*, 138 S. Ct. at 1508. It is accordingly the defendant, not his lawyer, who is entitled to determine whether it is worth risking the rescission of his plea agreement in order to have a chance, "however small," of overturning the conviction or proceeding to trial. *Id.*; *see Faretta*, 422 U.S. at 834 (though a client may exercise his prerogative "ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law' "); *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (similar). "These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *McCoy*, 138 S. Ct. at 1508. And such choices "rest[] with the defendant." *Flores-Ortega*, 528 U.S. at 485.

The Idaho Supreme Court also asserted that an attorney has a duty to "keep[] frivolous and futile litigation out of the courts" that overrides any obligation to follow the client's directive to appeal. Pet. App. 13a. The State of Louisiana made virtually the same argument in *McCoy*, and this Court rejected it. The Court held that a defendant was entitled to demand that his attorney "maintain his innocence" even where the evidence against him was "overwhelming" and his "alibi"—that "corrupt police killed the victims"—was "difficult to fathom." 138 S. Ct. at

1506-09. Similarly, in *Lee*, the Court held that a defendant had the right to instruct his attorney to refuse a guilty plea even where he "had no real defense to the charge" and the prospect of conviction and subsequent deportation was "[a]lmost certain[ ]." 137 S. Ct. at 1962, 1968.

Indeed, this Court has already held—repeatedly—that an attorney is obligated to respect his client's wish to appeal even if "counsel finds [the client's] case to be wholly frivolous." *Anders* v. *California*, 386 U.S. 738, 744 (1967); *see Penson*, 488 U.S. at 80; *Smith* v. *Robbins*, 528 U.S. 259, 277-278 (2000). In *Anders*, the Court explained that the attorney's "role as advocate requires that he support his client's appeal to the best of his ability" even in that circumstance. 386 U.S. at 744. The Court held that courts may develop procedures to quickly screen out meritless appeals, including by permitting an attorney to file "a brief referring to anything in the record that might arguably support the appeal" and "request[ing] permission to withdraw" if he finds no merit in the client's claims. *Id.*; *see Robbins*, 528 U.S. at 276 (authorizing States to develop alternative procedures that achieve the same objective); *State* v. *McKenney*, 568 P.2d 1213, 1214 (Idaho 1977) (per curiam) (adopting a procedure that requires counsel to address the merits on appeal without withdrawal). But the Constitution does not permit an attorney to unilaterally abandon an appeal upon a "bare assertion" that "there is no merit to the appeal." *Penson*, 488 U.S. at 80. At minimum, it "requires both counsel *and the court* to find the appeal to be * * * frivolous" before the defendant may be denied the assistance of counsel on direct appeal. *Robbins*, 528 U.S. at 280 (emphasis added).

The Idaho Supreme Court's rationale cannot be reconciled with these precedents. It would make a defendant's right to appeal contingent on an attorney's unilateral judgment as to whether the appeal is meritorious. That would render *Anders* (and *Penson*) a dead letter for the overwhelming majority of criminal defendants. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005) (describing the rising prevalence of appeal waivers and finding, over a decade ago, that 90% of plea agreements in the Ninth Circuit and two-thirds nationwide include appeal waivers). Counsel for those defendants could simply assert that they find no merit to the appeal, refuse to perform the "ministerial task" of filing a notice of appeal, and thereby deprive the client of the counseled direct appeal to which he is entitled. *Flores-Ortega*, 528 U.S. at 477. That cannot be right.

Yet that is what occurred here. By his own admission, Mr. Garza's attorney disregarded his client's instruction to appeal because he deemed such an appeal "problematic" in light of the fact that his client allegedly "received the sentence(s) he bargained for." Pet. App. 52a. That usurpation of the client's decision whether to appeal did not amount to "assistance" of counsel in any meaningful sense. *Flores-Ortega*, 528 U.S. at 476-477. Rather, it effected the "[a]ctual or constructive denial of the assistance of counsel altogether," which is "legally presumed to result in prejudice." *Penson*, 488 U.S. at 88 (quoting *Strickland*, 466 U.S. at 692). Mr. Garza is accordingly "entitled to [a new] appeal." *Flores-Ortega*, 528 U.S. at 477; *see McCoy*, 138 S. Ct. at 1511.

3. It would be profoundly unfair to require defendants to make an individualized showing of prejudice.

A final consideration reinforces the first two rationales for presuming prejudice. As *Flores-Ortega* explained, it would be profoundly unfair to require an "indigent * * * defendant" to first prove that he was prejudiced by his attorney's improper refusal to follow his direction to appeal before even being permitted to pursue it. 528 U.S. at 486.

a. When a trial attorney disregards his client's instruction to perfect an appeal, he deprives the defendant of more than just an appellate proceeding. He deprives the defendant of the assistance of counsel altogether. "There is no constitutional right to an attorney in state post-conviction proceedings." *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991). And, in practice, the overwhelming majority of petitioners in postconviction proceedings cannot afford an attorney. *See* Nancy J. King et al., Final Technical Report: Habeas Litigation in U.S. District Courts 23 (2007) (finding that in non-capital cases, 92.3% of postconviction petitioners lack counsel).

Accordingly, requiring a defendant to first demonstrate prejudice in order to have his appeal restored means "requir[ing] an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." *Flores-Ortega*, 528 U.S. at 486. As the Court has recognized, that is plainly "unfair." *Id.*

Pro se defendants face formidable challenges in identifying, let alone showing the merit of, the claims

they might have raised on appeal. *See Peguero*, 526 U.S. at 30 (O'Connor, J., concurring) (describing the "heavy burden" such a requirement would impose). "Those whose education has been limited and * * * who lack facility in the English language might have grave difficulty in making even a summary statement of points to be raised on appeal." *Rodriquez*, 395 U.S. at 330. "[T]hey may not even be aware of errors which occurred." *Id.* As a result, these defendants may in practice "be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one." *Id.*; *see Cronic*, 466 U.S. at 659 (describing "[t]he presumption that counsel's assistance is essential").

It is inequitable to impose these burdens on a defendant simply because his attorney failed to perform the "purely ministerial task" of filing a notice of appeal at his client's request. *Flores-Ortega*, 528 U.S. at 477. A defendant "who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Id.* And where counsel fulfills that basic obligation, he ensures the defendant receives his constitutional right to the assistance of appellate counsel—one who will search the record for meritorious issues that further the client's objective, formulate arguments, and present the case on his behalf. An indigent defendant should not be stripped of that right, and forced to develop viable claims on his own, simply because his attorney "disregard[ed] specific instructions." *Id.* Rather, a defendant "whose right to an appeal has been frustrated should be treated exactly like any other appellan[t]" and granted an appeal—and an attorney—without the need to "specify the points he would

raise were his right to appeal reinstated." *Id.* at 485 (quoting *Rodriquez*, 395 U.S. at 330).

b. This fairness principle applies with equal (indeed, arguably greater) force where a defendant has signed an appeal waiver. A *pro se* defendant may have severe difficulty identifying and articulating viable claims that fall outside the scope of his appeal waiver. Indigent defendants are unlikely to know the intricate legal rules governing which claims survive an appeal waiver—for instance, which claims go to the validity or scope of the plea agreement and which claims might implicate "fundamental" rights. *See supra* pp. 16-20. And even if a defendant has a valid claim, he may not properly identify it. For example, a defendant whose plea is involuntary may simply recite that he wishes to challenge his sentence, because that is the ultimate goal of his appeal.

Furthermore, an indigent defendant is not likely to be capable of competently presenting the complex and record-intensive claims preserved by an appeal waiver. For instance, few *pro se* defendants will be adept at assembling the record evidence necessary to show that a plea was not knowing and voluntary. *United States* v. *Lee*, 888 F.3d 503, 505 (D.C. Cir. 2018) (explaining that such a claim requires examination of "the entire record"). Likewise, demonstrating that a claim falls outside the scope of the waiver often requires extensive and complex contractual interpretation that will tax the capacities of an uncounseled defendant. *See, e.g.*, *United States* v. *Hunt*, 843 F.3d 1022, 1027-29 (D.C. Cir. 2016) (determining that a plea waiver "only arguably or ambiguously forecloses [the defendant's] claims" after analyzing particular language of plea agreement, statements at plea hearing, legal dictionaries,

restatement of contracts, and judicial precedent); *United States* v. *Burden*, 860 F.3d 45, 53-55 (2d Cir. 2017) (per curiam) (collecting other examples).

Indeed, the facts of this case illustrate the unfairness of requiring a defendant to identify and support the claims he would raise on appeal prior to receiving the assistance of appellate counsel. In Mr. Garza's *pro se* postconviction petition, he argued—among other things—that he did not "plead guilty * * * knowingly [and] voluntarily." CR 10; *see* CR 6. The district court dismissed the petition "for lack of supporting evidence," because Mr. Garza identified no record material to support that claim. Pet. App. 29a. In fact, there *was* record material supporting that claim. Mr. Garza answered "No" when asked prior to his plea if he thought he was waiving his appellate rights. CR 97. The district court then accepted both of Mr. Garza's pleas without inquiring into his waiver of appellate rights. CR 125-126, 128-130; *see* Idaho Crim. R. 11(d)(3) (requiring courts to inform the defendant of such waiver). And the court repeatedly informed Mr. Garza of his right to appeal at his joint plea-and-sentencing hearing and in its written judgments. *See supra* pp. 4-5. If Mr. Garza had received the appeal to which he was entitled, competent appellate counsel might easily have presented this evidence to the appellate court.

c. In contrast to the serious inequities to the defendant of requiring an individualized showing of prejudice, applying a presumption of prejudice poses no unfairness to the government. By granting a defendant the right to bring his appeal, a court simply restores the defendant to the position he would have been in had his attorney "follow[ed] the defendant's express instructions" to file an appeal.

Flores-Ortega, 528 U.S. at 478. At that point, the government retains the full benefit of the bargain it struck with the defendant. On one hand, if the defendant's appeal falls within the ambit of the appeal waiver, then the government may enforce the agreement: It may move to dismiss the appeal as barred by the plea agreement; and, if it wishes, it may seek to rescind the agreement as a consequence of the defendant's breach. On the other hand, if the defendant's claim is *not* covered by the waiver—if, for instance, that claim goes to the voluntariness or enforceability of the agreement—then the government has not been deprived of any part of its bargain. Either way, the government's waiver retains full force, and permitting the defendant to bring his appeal does not alter its legal effect.

II. A Test That Requires A Defendant To Prove Prejudice In The Presence Of An Appeal Waiver Is Impractical And Inefficient.

The State proposes a contrary rule that sounds simple enough on the surface: Courts should deny a defendant the presumption of prejudice whenever his plea agreement contains an appeal waiver. But the rule founders in practice. Courts will be forced to grapple with difficult questions as to whether, and how, the rule applies in the face of a wide variety of appeal waivers. The State's rule also requires a burdensome inquiry by the habeas court that will needlessly drain judicial resources. In contrast, applying a presumption of prejudice whenever an attorney ignores a defendant's instruction to appeal preserves a readily administrable, bright-line rule.

A. The State's Rule Is Unworkable.

1. While it may be convenient to refer to "appeal waivers" in some shorthand sense, appeal waivers are in fact subject to substantial variation. *See* Susan R. Klein et al., *Waiving The Criminal Justice System: An Empirical And Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 85-87, 122-130 (2015) (describing variation in written scope of plea agreements, across 17 variables, across and within jurisdictions, and over time). In the federal system, the scope of appeal waivers is left to the discretion of districts or individual prosecutors. U.S. Dep't of Justice, U.S. Attorneys' Manual §§ 9-16.330, 9-16.331; Criminal Resource Manual, *supra*, § 626. Each state also employs its own framework for appeal waivers. *Compare, e.g.*, *State* v. *Sainz*, 526 A.2d 1015, 1021 & n.6 (N.J. 1987) (appeal waivers may never be enforced to bar appeal of sentence and may be enforced only through rescission), *with Ballweber* v. *State*, 457 N.W.2d 215, 218 (Minn. Ct. App. 1990) (appeal waiver may never bar appeal of sentence, period), *with State* v. *Loye*, 670 N.W.2d 141, 148 (Iowa 2003) (right to appeal may be waived "only if such a waiver is an express element of the particular agreement made by that defendant"). Some waivers preserve a defendant's ability to raise certain claims, including pretrial issues that would ordinarily be waived by the act of pleading guilty.[11] Others condition the

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[11] *See, e.g.*, *United States* v. *Lopez*, 655 F. Supp. 2d 720, 721 (E.D. Ky. 2009) (noting that the defendant reserved the "right to appeal the District Court's denial of his pretrial motions to suppress and the arguments contained therein"); *State* v. *Eger*, 155 P.3d 784, 785 (N.M. Ct. App. 2007) (recognizing that

availability of an appeal on the defendant's receipt of a particular sentence.[12]

Even when two waivers are intended to have the same reach, prosecutors may employ different language to articulate that intention, leading to differences in the way the waivers are enforced in court. For example, federal appeal waivers vary in the language they use to bar challenges to a defendant's sentence, and courts of appeals have accordingly reached varying conclusions as to what types of challenges those waivers bar. *Compare, e.g.*, *United States* v. *Oladimeji*, 463 F.3d 152, 156-157 (2d Cir. 2006) (interpreting a sentencing appeal waiver to preserve challenges to a restitution order based on the waiver's reference to the "total term of imprisonment"), *with United States* v. *Johnson*, 541 F.3d 1064, 1066, 1069 (11th Cir. 2008) (interpreting a waiver to reach restitution challenges where it referred more generally to appeals of the defendant's "sentence"). And even when appeal waivers use identical language, they may be treated differently by the courts depending on the jurisdiction in which the case arises. *See In re Sealed Case*, 702 F.3d 59, 65 (D.C. Cir. 2012) (collecting cases); *United States* v.

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defendant's conditional plea "specifically reserve[d] the right to appeal the issue of the six-month rule violation").

[12] *See, e.g.*, *United States* v. *Tapp*, 491 F.3d 263, 264 (5th Cir. 2007) (describing an appeal waiver that "reserved the right to appeal any punishment imposed in excess of the statutory maximum and any punishment that was an upward departure from the applicable guidelines range"); *Straub*, 292 P.3d at 276 (considering an appeal waiver that preserved the right to appeal a sentence "exceed[ing] the State's sentencing recommendation").

Worden, 646 F.3d 499, 503 (7th Cir. 2011) (same). The form of an appellate waiver may therefore differ from jurisdiction to jurisdiction, from court to court, and even from case to case.

This almost infinite potential for variation among appeal waivers makes it virtually impossible to administer a rule that makes the presumption of prejudice turn on the presence of an appeal waiver. Courts may not refuse to apply the presumption merely because an agreement waives *some* appellate rights; *Flores-Ortega* itself involved a guilty plea, which naturally "reduce[d] the scope of potentially appealable issues." 528 U.S. at 480. Courts will therefore have to determine when an appeal waiver is sufficiently comprehensive that it displaces the *Flores-Ortega* rule. And because of the wide variation among appellate waivers, courts will be forced to confront this question over and over again: Does a particular condition on an appeal waiver entitle the defendant to the presumption? What about the preservation of an additional issue for appeal or the use of different phrasing to describe the waiver? As different courts answer these questions differently, a defendant's entitlement to the presumption of prejudice will vary according to his jurisdiction, his prosecutor, or his judge.

The better approach is to maintain the straightforward rule this Court articulated in *Flores-Ortega*: An attorney must file the notice of appeal whenever his client instructs him to do so, full stop, regardless of the precise terms of his deal.

B. The State's Rule Wastes Judicial Resources.

Under the State's rule, a defendant is entitled to a new appeal only if he can convince the habeas court that he has a non-frivolous appellate claim that is not barred by his appeal waiver. That process imposes heavy burdens on both the litigants and the courts: A habeas petitioner, almost always acting *pro se*, must evaluate the voluntariness and scope of his waiver, assess the record to determine what claims remain to him on appeal, and then attempt to articulate those claims in his briefing. The government, in turn, must attempt to respond to the arguments put forward by the uncounseled petitioner. And, because a court must hold *pro se* litigants to a "less stringent standard[ ]," the habeas court itself must labor to construe the defendant's pleadings liberally to avoid overlooking a meritorious claim. *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *see also, e.g.*, *Pabon* v. *Wright*, 459 F.3d 241, 248 (2d Cir. 2006) (submissions of a *pro se* litigant must be interpreted "to raise the strongest arguments that they suggest" (citation omitted)). Indeed, courts in the few jurisdictions willing to adopt the State's rule have recognized this corresponding burden, undertaking an "'affirmative duty'" to examine the record for potential claims. *United States* v. *Dunlap*, No. 10-190, 2010 WL 4614557, at *2 (W.D. Pa. Nov. 5, 2010) (quoting *United States* v. *Mabry*, 536 F.3d 231, 237 (3d Cir. 2008)). Furthermore, if the defendant succeeds on habeas, a similar process must be repeated in front of the appellate court.

It is far more efficient simply to grant a defendant a new appeal once he has demonstrated that his

attorney disregarded his instruction to file a notice of appeal. The first and only review of the merits then occurs in front of the appellate court, eliminating any possibility of duplicative proceedings in multiple courts. It also increases the efficiency (and accuracy) of the merits review because a defendant is guaranteed the assistance of counsel on direct appeal. *See Coleman*, 501 U.S. at 752. That means his presentation of the merits of his case will be clearer and more comprehensive, making it easier for the government to respond to the defendant's arguments, and relieving the court of the need to carefully scrutinize the defendant's filings in search of meritorious claims.

These efficiencies are further enhanced by the range of procedural mechanisms appellate courts already have in place to quickly dispose of meritless appeals. For instance, the federal government may avail itself of procedures for summary dismissal where it believes that claims raised are within the scope of the defendant's waiver. Fed. R. App. P. 27, 11(g); *see, e.g.*, *Watson* v. *United States*, 493 F.3d 960, 963-964 (8th Cir. 2007) (allowing the government to prove, by dispositive motion, that a defendant's appeal waiver is enforceable). To take just one example, the Tenth Circuit has set forth a specific intra-circuit procedure for summarily dismissing appeals involving valid waivers. *United States* v. *Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc) (per curiam). Many states, including Idaho, have similar procedures. *See* Idaho App. R. 32(a); Brief in Opposition at 8 (explaining that "[a]ny appeal attempted in the face of a valid waiver" will be "subject to summary dismissal," which "generally will occur prior to briefing").

The process this Court prescribed in *Anders*, 386 U.S. at 744, also has an important role to play in appeals following an appeal waiver. If a defendant's appellate attorney finds that the appeal waiver has left the defendant without any nonfrivolous claims, she is permitted to file an *Anders* brief, in which she requests withdrawal but "refer[s] to anything in the record that might arguably support the appeal." *Id.* This process serves the "valuable purpose of assisting the court in determining * * * that the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Penson*, 488 U.S. at 81-82; *see also McKenney*, 568 P.2d at 1214 (adopting an *Anders* procedure that expends even "less of counsel and the judiciary's time and energy" by forgoing a separate motion to withdraw and requiring only counsel's views on the merits).

Presuming prejudice when a defendant can show that his attorney ignored an instruction to appeal will not open the floodgates to a stream of defendants pressing frivolous or forfeited appeals. In the nearly two decades since *Flores-Ortega*, eight federal courts of appeals have adopted the position that Mr. Garza advocates; habeas courts in those jurisdictions do not require defendants to specify the grounds for their appeal in order to be entitled to a presumption of prejudice. But that does not mean that they grant habeas relief whenever a defendant alleges that he instructed his attorney to appeal. A defendant must *prove* that fact, showing that, but for an attorney's deficient performance, the defendant "would have timely appealed." *Flores-Ortega*, 528 U.S. at 484. Where the defendant lacks evidence of his request,

but signed an appellate waiver, courts have generally dismissed such allegations on the papers.[13] The showing is "easily" made only in the rare circumstance—like this one—in which there is uncontroverted evidence that the defendant instructed his attorney to file an appeal notwithstanding an appeal waiver, and the attorney disregarded that instruction. *Id.* at 478.

Moreover, only a minority of cases involve an alleged instruction. The far more typical circumstance is one like *Flores-Ortega* itself, in which the attorney simply did not consult with the client regarding the possibility of appeal following an appellate waiver. *Id.* at 477. In those "silent" cases, an appeal waiver again renders it difficult for defendants who lack meritorious claims on appeal to make the showing prescribed by *Flores-Ortega*. As *Flores-Ortega* explains, an attorney renders deficient performance by failing to consult with his client about the possibility of an appeal only "when there is reason to think

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[13] *E.g.*, *Zanuccoli* v. *United States*, 459 F. Supp. 2d 109, 111-112 (D. Mass. 2006) (rejecting defendant's claim that he instructed his counsel to appeal as "highly implausible," without need for evidentiary hearing, given that "Petitioner expresaly waived his right to appeal"); *Gonzalez* v. *United States*, No. 08-10223-PBS, 2012 WL 5471799, at *5 (D. Mass. Nov. 8, 2012) (same); *Stolkner* v. *United States*, No. 2:15-cr-00143-JDL-1, 2018 WL 3212007, at *5 (D. Me. June 29, 2018) (no evidentiary hearing necessary for "Petitioner's allegation that he directed counsel to file a notice of appeal" because "Petitioner signed a plea agreement in which he agreed to waive his right to appeal"); *Bookwalter* v. *United States*, No. 2:14-CR-82, 2018 WL 2407525, at *5 (E.D. Tenn. May 25, 2018) (same); *Ceasar* v. *United States*, No. 2:17-cv-308-FtM-38MRM, 2018 WL 1964197, at *6-7 (M.D. Fla. Apr. 26, 2018) (same).

either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. Furthermore, the failure to consult does not constitute ineffective assistance of counsel unless, "but for counsel's deficient performance, [the defendant] would have appealed." *Id.* at 484.

As *Flores-Ortega* itself indicated—and as the majority of circuits have held—the fact that the defendant "expressly * * * waived some or all appeal rights" is likely to weigh heavily against an affirmative showing on these questions. *Id.* at 480. A "rational defendant" will rarely wish to appeal following entry of a plea containing an appeal waiver, given the more circumscribed number of meritorious claims he can bring and the potentially severe consequences of breaching the plea agreement. *Id.*[14] And a defend-

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[14] *See, e.g.*, *Parsons* v. *United States*, 505 F.3d 797, 799-800 (8th Cir. 2007) (finding that petitioner failed to establish duty to consult under *Flores-Ortega* in part because he "had waived his right to appeal"); *Jackson* v. *Attorney Gen. of Nevada*, 268 F. App'x 615, 620 (9th Cir. 2008) (finding "no merit" to petitioner's argument "[u]nder the first prong of the *Flores-Ortega* test" in part because the petitioner "waived all appellate rights" except challenges to jurisdiction or legality); *United States* v. *Washington*, 588 F. App'x 586, 586-587 (9th Cir. 2014) (same); *Devine* v. *United States*, 520 F.3d 1286, 1289 (11th Cir. 2008) (per curiam) (same); *United States* v. *Orosco*, 219 F. App'x 673, 674 (9th Cir. 2007) (same); *Johnson* v. *United States*, No. 5:16-CR-81-D-1, 2018 WL 1734920, at *13-14 (E.D.N.C. Mar. 14, 2018) (same), *report and recommendation adopted*, 2018 WL 1733983 (E.D.N.C. Apr. 9, 2018) (same); *Weems* v. *United States*, No. C17-1023RSL, 2018 WL 1470877, at *3 (W.D. Wash. Mar. 26, 2018) ("Particularly in light of the fact that petitioner had just

ant who just signed an appeal waiver is not likely to have engaged in other conduct that "reasonably demonstrated to counsel that he was interested in appealing." *Id.*[15] There may be exceptional cases in which a defendant does have a meritorious claim or strongly indicated that he wished to appeal notwithstanding the waiver. But those rare cases are precisely the ones in which defendants *should* be able to appeal—and in which their attorneys have an obligation to assist them in doing so.

* * *

Few rights are more "fundamental" to a criminal defendant than the "right to be represented by counsel," because it is the attorney who is charged with "assert[ing] any other rights [the defendant]

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pleaded guilty pursuant to a plea agreement that waived appeal rights, counsel would have had no reason to suspect petitioner wanted to appeal."); *Mays* v. *United States*, No. 3:12-cr-110-J-34JRK, 2018 WL 3301895, at *4 (M.D. Fla. July 5, 2018) (same); *Perez* v. *United States*, No. 3:12-CR-0133-N (01), 2016 WL 4276006, at *8 (N.D. Tex. May 31, 2016), *report and recommendation adopted*, 2016 WL 4268927 (Aug. 15, 2016) (same).

[15] *See, e.g.*, *United States* v. *Calderon*, 665 F. App'x 356, 366 (5th Cir. 2016) (per curiam) (finding no duty to consult because "nothing material changed" after the defendant signed the appeal waiver); *Spear* v. *United States*, No. 3:12-CR-0323-D, 2015 WL 9583525, at *4 (N.D. Tex. Nov. 18, 2015), *report and recommendation adopted*, 2015 WL 9489569 (Dec. 30, 2015) (finding "no reason, given Petitioner's limited appeal rights, for counsel to believe that a rational defendant would want to appeal"); *Gonzalez* v. *United States*, No. 5:10-CR-00172-F-1, 2015 WL 5797628, at *2-3 (E.D.N.C. Oct. 1, 2015); *Moya* v. *United States*, No. 5:15-CR-064-01-C, 2018 WL 3039340, at *5 (N.D. Tex. May 30, 2018), *report and recommendation adopted*, 2018 WL 3038513 (June 19, 2018).

may have." *Cronic*, 466 U.S. at 653-654. When counsel disregarded Mr. Garza's express instruction to file a notice of appeal, he prevented Mr. Garza from pursuing the counseled appeal to which he is entitled. He usurped Mr. Garza's authority to make a fundamental choice about his own defense. And he stripped Mr. Garza of the aid of counsel in asserting some of his most basic, unwaived claims, including that his plea agreement was not knowing and voluntary.

"[N]o further showing" is necessary to establish that Mr. Garza was denied the "assistance of counsel." *Flores-Ortega*, 528 U.S. at 484. Because Mr. Garza has "made out a successful ineffective assistance of counsel claim," he is "entitled to a new appeal." *Id.* at 484-485.

CONCLUSION

The judgment of the Supreme Court of Idaho should be reversed.

Respectfully submitted,

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No. 17-1026

In The
Supreme Court of the United States

GILBERTO GARZA, JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Idaho

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QUESTION PRESENTED

Does the "presumption of prejudice" recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	8
ARGUMENT	10
Defense Counsel Does Not Perform Deficiently And Does Not Presumptively Prejudice His Client When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver	10
A. Defense Counsel Does Not Perform Deficiently When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver	12
B. Defense Counsel Does Not Presumptively Prejudice His Client When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver	21
C. Practical Considerations Do Not Support Adopting A Presumption Of Prejudice Here	31
CONCLUSION	38

TABLE OF AUTHORITIES

Page

CASES

Anders v. California, 386 U.S. 738 (1967) 36
Bell v. Cone, 535 U.S. 685 (2002) 31
Boykin v. Alabama, 395 U.S. 238 (1969) 10
Charboneau v. State, 102 P.3d 1108 (Idaho 2004)..... 29, 34
Coleman v. Thompson, 501 U.S. 722 (1991) 35
Florida v. Nixon, 543 U.S. 175 (2004) 19, 22, 31, 33
Glover v. United States, 531 U.S. 198 (2001).....33
Harrington v. Richter, 562 U.S. 86 (2011) 12, 18
Hill v. Lockhart, 474 U.S. 52 (1985) 30, 33
Jones v. Barnes, 463 U.S. 745 (1983).....19
Kimmelman v. Morrison, 477 U.S. 365 (1986) 31, 33
Lee v. United States, 137 S. Ct. 1958 (2017) 12
Lockhart v. Fretwell, 506 U.S. 364 (1993).....22
Martinez v. Ryan, 566 U.S. 1 (2012) 34
Massaro v. United States, 538 U.S. 500 (2003) 34
McCoy v. Louisiana, 138 S. Ct. 1500 (2018).....20
McKinney v. State, 396 P.3d 1168 (Idaho 2017) 18, 19, 25, 26
Missouri v. Frye, 566 U.S. 134 (2012) 33
Nunez v. United States, 546 F.3d 450 (7th Cir. 2008) 14, 19
Padilla v. Kentucky, 559 U.S. 356 (2010).....33

TABLE OF AUTHORITIES—Continued

Page

Peguero v. United States, 526 U.S. 23 (1999) 14, 15

Rodriguez v. United States, 395 U.S. 327 (1969) 14, 15

Roe v. Flores-Ortega, 528 U.S. 470 (2000) .....*passim*

Smith v. Robbins, 528 U.S. 259 (2000) 22, 31, 32, 36

State v. Murphy, 872 P.2d 719 (Idaho 1994) 35

Strickland v. Washington, 466 U.S. 668 (1984) ...*passim*

United States v. Cronic, 466 U.S. 648 (1984) 22, 31

United States v. Mabry, 536 F.3d 231 (3d Cir. 2008) 26

Weaver v. Massachusetts, 137 S. Ct. 1899 (2017).....32

Williams v. Taylor, 529 U.S. 362 (2000).....12

Wong v. Belmontes, 558 U.S. 15 (2009).....12

Wright v. Van Patten, 552 U.S. 120 (2008) 31

Wright v. West, 505 U.S. 277 (1992).....12

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 12

STATUTES

Idaho Code § 19-2514 1

STATEMENT OF THE CASE

1. In January of 2015, Gilberto Garza, Jr., entered an *Alford* guilty plea to aggravated assault. Pet. App. 28a. The following month, in a separate case, he pleaded guilty to possession of a controlled substance with intent to deliver. Pet. App. 28a. Both pleas were entered as part of binding plea agreements, which contemplated consecutive sentences of five years with two years fixed in the aggravated assault case and five years with one year fixed in the possession case, for aggregate sentences of three to ten years. Pet. App. 28a-29a. In exchange, the State of Idaho dismissed a persistent violator enhancement of the possession charge that would have made Garza eligible for a sentence of up to life without the possibility of parole, Idaho Code § 19-2514; agreed not to file additional felony counts of burglary and grand theft; and secured a promise from the Bureau of Alcohol Tobacco and Firearms not to refer Garza for prosecution for unlawful possession of ammunition. Pet. App. 41a, 47a.

The binding plea agreements "barred Garza from appealing the convictions and sentences." Pet. App. 29a. Both agreements stated that "Defendant Gilberto Garza Jr. waives his right to appeal. . . ." Pet. App. 29a, 44a, 49a. Garza signed and dated both agreements and initialed the appeal-waiver provisions. Pet. App. 29a, 45a, 50a. When filling out the guilty plea advisory form in the possession with intent case four days before he signed the plea agreement, *compare* R. 93 (guilty plea questionnaire completed February 20, 2015) *with* App. 50a (plea agreement signed February 24, 2015), Garza

checked "no" on the question of whether he was waiving appeal rights, R. 97, ¶ 19. In the aggravated assault case he checked "yes" in relation to having waived his appeal rights. R. 109, ¶ 19. At the sentencing hearing, the district judge asked the prosecutor if he should still inform Garza of his appeal rights despite the waiver. R. 132 (Tr., p. 35, Ls. 6-9). The prosecutor stated that "in [her] experience" such an advisory of rights was still given. R. 132 (Tr., p. 35, Ls. 10-15). The district court so advised Garza. R. 132 (Tr., p. 35, Ls. 16-21). Garza was given the sentences he bargained for. Pet. App. 2a. He did not appeal. Pet. App. 3a.

2. About four months later, Garza filed petitions for post-conviction relief in state district court. Pet. App. 3a. Garza's *pro se* petitions alleged three claims for relief: (1) that he received ineffective assistance of counsel, (2) that his pleas were involuntary, and (3) that the calculation of credit for pre-sentencing incarceration was inaccurate. R. 6, 206. His claim that trial counsel was ineffective included that trial counsel "failed to file an appeal of sentence within 42 day limit." R. 7, 207 (capitalization altered). For relief, Garza requested that his consecutive sentences be run concurrently. R. 7, 207.

Garza supported his claim that counsel was ineffective for failing to file an appeal of his sentences with an affidavit asserting his counsel "failed to file an appeal within 42 day limit after I continuously reminded him via phone calls and letters." R. 210 (capitalization altered), *see also* R. 10. The district court granted

Garza's request for appointed post-conviction counsel. R. 24, 224.

The district court summarily dismissed most of Garza's claims, including Garza's claims that the pleas were involuntary. R. 26-36, 62-66, 226-36, 263-67. After reviewing the guilty plea agreements, guilty plea advisory forms, and the entry of plea hearing audio recordings, the district court concluded that Garza's "petitions do not allege facts sufficient to make out a *prima facie* case that Garza's guilty pleas were coerced or otherwise invalid." R. 30, 230.

However, the district court found that Garza's assertion that "his counsel was ineffective for failing to file an appeal" was a "potentially viable claim." R. 31, 231. The district court, while summarily dismissing every other claim, therefore allowed "further proceedings" on the sole remaining claim. R. 64-65, 265-66.

3. Both parties moved for summary judgment on the claim that Garza's trial counsel was ineffective for failing to file an appeal. R. 75-169, 273-361. In addition to portions of the record from the criminal cases, the state submitted affidavits from Garza's trial counsel in support of its motion. R. 147-52, 351-56. Trial counsel's sworn statement included the following:

> Mr. Garza indicated to me that he knew he agreed not to appeal his sentence(s) but he told me he wanted to appeal the sentence(s) of the court. Mr. Garza received the sentence(s) he bargained for in his ICR 11(f)(1)(c) Agreement. I did not file the appeal(s) and informed

> Mr. Garza that an appeal was problematic because he waived his right to appeal in his Rule 11 agreements.

Pet. App. 52a.

Garza did not support his motion with additional evidence. R. 164-69, 273-78. In his memorandum he conceded that "[a]n examination of the record would lead a reasonable person to conclude the [appeal] waiver was by the book"; that Garza "received exactly what he bargained for in exchange for his plea"; and that "[t]here was no ambiguity in sentencing regarding the penalty he received." R. 161-62, 276-77. Nevertheless, Garza maintained that "his right to appeal should be reinstated." R. 160, 275.

The district court ordered Garza to file supplemental briefing, and submit any necessary evidence, "to identify the issues he wants to pursue on appeal, as well as to explain to the Court why his appeals would not be frivolous and not be subject to dismissal as a result of his waiver of the right to appeal in his plea agreements." R. 172, 367. Garza responded that "[t]he only issue that could be identified is sentencing review." R. 176, 371. He did not submit additional evidence, but pointed out that "in his guilty plea form in [the possession case], on page 5 of 8 question 19 asks if he has waived his right to appeal? His response is a checked no box." R. 177, 372. Garza concluded his supplemental briefing by requesting that the district court "reinstate his right to appeal in both of his cases." R. 178, 373.

The district court entered an order denying Garza's motion and granting the state's motion for summary judgment, dismissing the remaining claim of ineffective assistance of counsel for failing to file an appeal. Pet. App. 28a-39a. Without controlling Idaho authority on the effect of the appeal waiver, the district court turned to the split in the federal circuits and concluded the minority rule, that prejudice was not presumed in the face of an appeal waiver, was "better reasoned." *Id.* at 36a-38a. Pursuant to that standard, the court required Garza to show prejudice by "show[ing] non-frivolous grounds for asking the appellate court to decide his appeal on the merits, despite the appeal waiver"—in other words, Garza needed to show "that there are non-frivolous grounds for contending on appeal either that (i) the appeal waiver is invalid or unenforceable, or (ii) the issues he wants to pursue on appeal are outside the waiver's scope." *Id.* at 38a.

The district court concluded that Garza failed to show prejudice. *Id.* at 38a-39a. As to the first manner of showing prejudice, the district court found that Garza had not shown that the waivers were invalid or unenforceable because the record of the criminal cases established they were "valid parts of plea agreements into which Garza knowingly, voluntarily, and intelligently entered." *Id.* at 38a. The district court concluded Garza had not met the second manner of proving prejudice because "the [sentencing] appeals Garza asked his counsel to file have not even been argued, much less shown, to be outside the scope of Garza's appeal

waivers." *Id.* at 38a. *See also* Pet. App. 31a (sentencing was the only issue Garza identified that he wanted to appeal).

4. Garza appealed from the district court's order summarily dismissing his petitions, R. 196-98, 391-93, challenging only the district court's dismissal of his ineffective assistance of counsel claim, *see* Pet. App. 16a. The Idaho Court of Appeals affirmed. *Id.* at 25a-27a. The Court of Appeals noted that while "a defendant may still file a notice of appeal after waiving his or her appellate rights," the waiver prevented a decision on the merits. *Id.* at 26a. Quoting the district court, the Court of Appeals therefore held Garza's loss of an "'opportunity to see his appeal dismissed without a decision on the merits'" was not presumptively prejudicial. *Id.* at 26a. "Moreover," the court stated, "forcing an attorney to file an appeal—despite a waiver of appellate rights—impedes an attorney's ability to exercise professional judgment in deciding whether to file a notice of appeal. An attorney has a duty to avoid frivolous litigation, and filing a futile appeal is frivolous." *Id.* at 26a (internal citation omitted).

The Court of Appeals determined "the minority rule advances the attorney's duty to preserve the benefit of the plea agreement—thereby protecting the defendant." *Id.* at 26a-27a. The Idaho Court of Appeals concluded that "Garza was required to make a showing of prejudice with evidence that the waiver was invalid or unenforceable or that the claimed issues on appeal were outside the scope of the waiver." *Id.* at 27a. Because "Garza . . . made no such showing or argument,"

the Court of Appeals affirmed the dismissal of the petitions. *Id.* at 27a.

5. The Idaho Supreme Court granted review and affirmed. Pet. App. 1a-15a. Like the district court and the Idaho Court of Appeals before it, the Idaho Supreme Court applied the minority rule, which "does not presume deficiency or prejudice when an attorney denies his client's instruction to file an appeal when there has been an appeal waiver." *Id.* at 8a. The court therefore declined "to presume counsel ineffective for failing to appeal at Garza's request when Garza has waived the right to appeal," and held instead that "Garza must show deficient conduct and resulting prejudice." *Id.* at 10a. The Idaho Supreme Court concluded that any exception to the *Strickland* standard set forth in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), would not apply here, because "[o]nce a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal." Pet. App. 11a. Thus, the Idaho Supreme Court concluded, "the presumption of prejudice articulated in *Flores-Ortega* would not apply after a defendant has waived his appellate rights." *Id.* at 11a. Because Garza needed to "show deficient performance and resulting prejudice to prove ineffective assistance of counsel," and because he "cannot show such grounds," the Idaho Supreme Court affirmed the dismissal of Garza's petitions. *Id.* at 15a.

SUMMARY OF THE ARGUMENT

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this Court applied the case-by-case analysis of *Strickland v. Washington*, 466 U.S. 668 (1984), to an allegation that an attorney was ineffective for not filing an appeal. It stated that a lawyer who fails to appeal upon request performs deficiently where filing the appeal is merely ministerial, but rejected an inquiry into deficient performance of counsel that was not "circumstance-specific." *Flores-Ortega*, 528 U.S. at 477-78. It further held that counsel's deficient performance regarding filing an appeal presumptively prejudices the defendant if it denies a defendant an appeal that he "wanted at the time and to which he had a right," but rejected a *per se* prejudice standard that did not inquire into whether counsel's actions "caus[ed] the forfeiture of the defendant's appeal." *Id.* at 483-84.

The Idaho Supreme Court's decision to "decline to presume counsel ineffective for failing to appeal at Garza's request when Garza [had] waived the right to appeal as part of a plea agreement," Pet. App. 10a, was correct and consistent with *Flores-Ortega* and the general application of *Strickland* on a case-by-case basis. Where, as here, a defendant requests an appeal that he has previously waived as part of a plea agreement, the filing of an appeal is not a merely ministerial act, but instead requires legal analysis of the sort regularly engaged in by defense counsel. Nor is a defendant prejudiced where counsel declines to pursue a waived appeal because counsel's actions cannot forfeit an appeal that the client already affirmatively waived.

Garza argues counsel was ineffective because there are other issues (such as the voluntariness of the plea and waiver) that would have been entertained by an appellate court despite the appeal waiver. This is inconsistent with the inquiry set forth in *Flores-Ortega*. First, it is not deficient performance to not file an appeal different than the one requested by the client, especially an appeal that might deprive the client the benefit of his plea agreement without his consent. Second, the argument ignores the conditions precedent to a determination that counsel forfeited the appeal: that the client both wanted the appeal and that he had a right to it. Garza wanted an appeal of his sentences. However, he had no right to an appeal of his sentences because of the waiver. Even if he had a right to raise other issues, he never claimed that was the appeal he wanted.

This Court's precedents mandate an evaluation of counsel's actions and any potential prejudice in light of the facts, including the appeal waiver and the appeal requested. A legal standard that requires counsel to pursue appellate goals other than those articulated by the client (the appeal he "wanted"), and perhaps at odds with the client's desires, merely because that is the only appeal to which he had a "right," is contrary to those precedents. Garza has failed to show any reason to deviate from this Court's established precedents applying the *Strickland* standard on a case-by-case basis.

The judgment of the Idaho Supreme Court should be affirmed.

ARGUMENT

Defense Counsel Does Not Perform Deficiently And Does Not Presumptively Prejudice His Client When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver

A criminal defendant who pleads guilty waives many constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Some criminal defendants further agree, in their plea agreements, to waive their rights to appeal their convictions and sentences. This case concerns defense counsel's obligations when a defendant who pleaded guilty and waived his right to appeal asks counsel to file an appeal that is plainly within the scope of the appeal waiver. Both Garza and his counsel stated that Garza only asked counsel to appeal the sentence the trial court imposed—a matter unquestionably covered by his appeal waiver. Counsel did not perform deficiently when he declined that request, any more than he would have performed deficiently had he declined a demand by Garza post-plea that he confront his accusers. At the very least, a defendant such as Garza is not presumptively prejudiced when his counsel declines to file an appeal on a plainly waived matter.

Garza argues that to show ineffective assistance of counsel he need only prove that he requested an appeal and that his attorney did not file a notice of appeal. Brief for Pet. 10-43. His underlying premise is that "a number of fundamental issues concerning the validity, scope, and enforceability of [the] plea agreement and waiver" may be raised despite the appeal waiver. *Id.* at 16. Thus, counsel's decision to not file the notice of appeal forfeits these issues, *id.* at 16-23, and usurps the client's choice of whether to appeal, *id.* at 23-28. He further argues that it would be "profoundly unfair" to require a petitioner to prove more than that he asked for an appeal and that the attorney did not file one, *id.* at 29-33, and that imposing a burden of proof beyond these two facts would be unworkable and a waste of judicial resources, *id.* at 33-43. This argument, however, is contrary to this Court's requirement that a court consider all of the circumstances confronting counsel when reviewing his or her performance, and that counsel's actions prejudice a defendant only where counsel's actions caused the forfeiture of an appeal the client both wanted and had a right to. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Because Garza requested an appeal of his sentence, an appeal within the scope of the waiver, counsel was not deficient in concluding the requested appeal was waived, and Garza suffered no forfeiture of an appeal he both wanted and to which he had a right.

A. Defense Counsel Does Not Perform Deficiently When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver

1. To establish ineffective assistance of counsel, a claimant must generally show both "that counsel's performance was deficient" to the point counsel was "not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and that the deficient performance "prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[T]he *Strickland* test 'of necessity requires a case-by-case examination of the evidence.'" *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (quoting *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in judgment)). "[C]ategorical rules are ill suited to an inquiry that we have emphasized demands a case-by-case examination of the totality of the evidence." *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017) (internal quotations and citations omitted).

To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). "[T]he performance inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.'" *Wong v.*

Belmontes, 558 U.S. 15, 17 (2009) (quoting *Strickland*, 466 U.S. at 688-89).

This analysis "applies to claims, like the respondent's, that counsel was constitutionally ineffective for failing to file a notice of appeal." *Flores-Ortega*, 528 U.S. at 476-77. Specifically, "'[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel'" and "courts must 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case,'" showing a high degree of deference. *Id.* at 477 (brackets original) (quoting *Strickland*, 466 U.S. at 688-90). In *Flores-Ortega*, the Court rejected the circuit court's bright line rule that counsel "is *per se* deficient" if he fails to file a notice of appeal unless the defendant specifically instructed him not to, because such a test fails to "engage in the circumstance-specific reasonableness inquiry required by *Strickland*." *Id.* at 478.

2. The "circumstances faced by defense counsel" under the "facts of [this] particular case" are that Garza requested an appeal of his sentence even though such an appeal was squarely within the scope of a valid plea waiver. Trial counsel correctly concluded that attempting the requested appeal was "problematic." Not only was there no reasonable hope of attaining the requested appellate review of the sentences under the facts of this case, there was the real possibility that the prosecution would be released from its obligations under the plea agreement—and therefore entitled to charge additional felonies and seek an enhancement

that could result in a life sentence. Trial counsel acts reasonably and competently when he does not cost his client the benefit of the plea bargain merely to file an appeal that would necessarily be rejected as waived.

As Judge Easterbrook explained, a lawyer "might have a responsibility to file an appeal if the client indicated a desire to withdraw the plea, for that amounts to a declaration by the defendant of willingness to give up the plea's benefits, and withdrawal would abrogate the waiver too." *Nunez v. United States*, 546 F.3d 450, 455 (7th Cir. 2008). But where, as here, a defendant "does not contend that he told his lawyer that he had any desire to achieve that goal by an appeal," the lawyer "has a duty to his client to avoid taking steps that will cost the client the benefit of his plea bargain." *Id.* Indeed, "[a] defendant has more reason to protest if a lawyer files an appeal that jeopardizes the benefit of the bargain than to protest if the lawyer does nothing—for 'nothing' is at least harmless." *Id.*

3. Garza glosses over the nature of his appeal request based on the Court's statement in *Flores-Ortega* that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Brief for Pet. 12 (quoting 528 U.S. at 477 (citing *Rodriguez v. United States*, 395 U.S. 327 (1969); *Peguero v. United States*, 526 U.S. 23, 28 (1999))). That sentence cannot bear the weight Garza places on it for neither *Flores-Ortega*, *Rodriguez*, nor *Peguero* involved an appeal to which the defendant had no right by virtue of a valid

waiver. These cases do not require a court to ignore the facts of an appeal waiver and that the defendant requested to appeal a waived issue.

In *Rodriguez*, "counsel failed to file a notice of appeal, despite being instructed by the defendant to do so," and the defendant "was entitled to a new appeal without any further showing." *Flores-Ortega*, 528 U.S. at 485. However, Rodriguez was convicted after a trial. *Rodriguez*, 395 U.S. at 328, 331. The reason Rodriguez had no duty to make a further showing was because his "'*right* to an appeal [had] been frustrated.'" *Flores-Ortega*, 528 U.S. at 485 (emphasis and brackets added) (quoting *Rodriguez*, 395 U.S. at 330). In *Peguero*, the issue before the Court was "whether a district court's failure to advise a defendant of his right to appeal as required by the Federal Rules of Criminal Procedure provides a basis for collateral relief even when the defendant was aware of his right to appeal when the trial court omitted to give the advice." *Peguero*, 526 U.S. at 24. In its analysis the Court set forth the holding of *Rodriguez*, that "a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit," but stated that holding "is not implicated here." *Id.* at 28. Neither of these cases purport to resolve whether counsel performs deficiently by declining to file a requested appeal to which the defendant had no right.

Nor did *Flores-Ortega* address the issue presented here. In fact, *Flores-Ortega* differs from this case on two levels. First, the Court left undisturbed the lower courts' finding that Flores-Ortega did *not* specifically

instruct his counsel to file a notice of appeal. *Flores-Ortega*, 528 U.S. at 475. Thus, the question presented was whether counsel was "deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other," and turned on counsel's duty to consult about an appeal. *Id.* at 477-78. Second, and more importantly, unlike Garza, Flores-Ortega did not waive his appeal rights. *See id.* at 488 n.1 (Souter, J., concurring in part and dissenting in part) ("there is no claim here that Flores-Ortega waived his right to appeal as part of his plea agreement"). *Flores-Ortega* therefore did not address whether counsel performs deficiently when he fails to comply with a client's request to appeal on an issue within the clear scope of a valid plea agreement appeal waiver.

All Garza can muster to support his argument that the waiver is irrelevant is to note that *Flores-Ortega* referenced appeal waivers in dicta later in the opinion when addressing an entirely different issue. *See* Brief for Pet. 15 (citing *Flores-Ortega*, 528 U.S. at 480). From this, Garza draws the negative inference that the Court established a "rule" that appeal waivers are irrelevant when assessing whether counsel performed deficiently by failing to file a requested notice of appeal. *Id.* That "dicta squared" approach to interpreting this Court's opinions cannot be right. Had *Flores-Ortega* directly spoken to the issue presented here it would have been dicta for the reasons set out in the prior paragraph. The Court's refusal to offer such dicta does not somehow transmogrify into a legal rule

on the matter about which it was silent based on other dicta on a different issue offered elsewhere in the opinion.

4. The reasoning in *Flores-Ortega* supports the Idaho Supreme Court's ruling on the deficient performance issue. This Court identified three reasons why failure to file a requested appeal generally constitutes deficient performance: (1) "a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice"; (2) failure to file the appeal "cannot be considered a strategic decision"; and (3) "filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." 528 U.S. at 477. None of these reasons supports finding deficient performance here.

First, Garza did not "reasonably rely" on counsel to file the requested appeal of his sentences. Garza affirmatively waived such an appeal in his plea agreement. Counsel informed him that the appeal waiver rendered his request for an appeal of his sentences "problematic" and that he would not be filing an appeal. Relying on counsel to attempt to invoke a validly waived right is not reasonable.

Second, whether to file a requested appeal despite an appeal waiver *is* a strategic decision. Analyzing and resolving legal issues related to whether to appeal despite a waiver (such as whether a particular claim survives the waiver or whether the waiver itself may be challenged) is squarely within the wide range of professional assistance provided by counsel. Garza's only

hope of securing appellate review of his sentences was to show that the issue was outside the scope of his waiver. *See, e.g.*, *McKinney v. State*, 396 P.3d 1168, 1178 (Idaho 2017) (to proceed on appeal in face of appeal waiver, appellant must show good cause). An assessment of the scope of the appeal waiver is well within the scope of counsel's normal representation. Because counsel correctly concluded that Garza had no right to the requested appeal of his sentences, this factor does not tend to show counsel's performance was outside "the 'wide range' of reasonable professional assistance." *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689).

Third, whether to follow a client's instructions contrary to the client's formal waiver is a choice with legal ramifications, not merely a ministerial act. As discussed, attempting to appeal despite the waiver might have cost Garza the benefit of the plea agreement. Pet. App. 14a. Garza never claimed he would have wanted to risk the prosecution re-filing dismissed charges or otherwise acting on the breached plea agreement where he had no chance of securing appellate review of his sentence. Unlike in *Flores-Ortega*, the issue facing Garza's counsel was substantive, not merely ministerial.

On top of that, waivers are enforced by the Idaho courts. Pet. App. 4a-5a. "Once a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal." *Id.* at 11a. "It is true that a defendant may still file a notice of appeal after waiving his or her appellate rights—but the

appellate waiver denies the defendant a decision on the merits." *Id.* at 26a. To get Garza his requested appeal of his sentences, counsel would have had to show cause why the appeal was not barred by the waiver. *See McKinney*, 396 P.3d at 1178.

That changes the calculus. As Judge Easterbrook explained, "[a] defendant who waits past the time for appeal (10 days in federal court) before asking his lawyer to proceed cannot expect that this will be done as a 'purely ministerial' task, for after 10 days there is no longer a right to appeal; likewise there is no longer a right to appeal following a waiver. Filing an appeal after a waiver is no more a 'ministerial duty' than preparing for trial would be a lawyer's ministerial duty after the defendant pleads guilty." *Nunez*, 546 F.3d at 454.

5. Garza is equally off base when he asserts that trial counsel performed deficiently because he "usurp[ed] a decision committed to the client alone." Brief for Pet. 23 (italics omitted). No one disputes that the decision whether to appeal was Garza's. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Garza made that decision, however, when he waived his appeal rights. Because Garza had no surviving right to an appeal of his sentences, trial counsel no more "usurped" Garza's decision than he usurped Garza's right to a jury trial or to confront his accusers.

Indeed, Garza's proposed rule is the one that jeopardizes defendants' autonomy. Garza wanted an

appeal to challenge his sentences; the relief he requested was concurrent sentences. R. 7, 207. Yet he now argues that trial counsel must be presumed ineffective for failing to pursue an appeal to invalidate the plea agreement entirely. Brief for Pet. 16-17. Deciding "the objective of the defense" is a decision "reserved for the client." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). A legal standard requiring counsel to raise on appeal "issues concerning the validity, scope, and enforceability of [the] plea agreement and waiver," Brief for Pet. 16, when the defendant specifically requested a challenge only to his sentences, would be the actual usurpation.

One of Garza's amici, The Ethics Bureau at Yale, recognizes that an attorney in trial counsel's position, who has been asked to appeal in the face of a clear appellate waiver, must consult with the client before "mak[ing] arguments on appeal that could breach the client's plea agreement." Amicus Br. 4; *see also id.* at 13-14 (whether to put the "entire plea agreement at risk" is a choice for the client to make once he appreciates and understands the consequences of that choice). But Garza has never claimed that his counsel was ineffective for failing to consult with him about pursuing an appeal to undo the plea agreement after Garza requested an appeal to challenge his sentences. Rather, he has always maintained that the request for an appeal of his sentences alone triggered the duty to appeal. It did not.

* * *

Where a client has both waived appeal rights and subsequently requested an appeal, he or she is attempting to invoke a previously waived right. Under the "circumstance-specific reasonableness inquiry required by *Strickland*," *Flores-Ortega*, 528 U.S. at 478, counsel who correctly concludes that the client is asking to invoke a validly waived right does not perform deficiently by declining to file a frivolous notice of appeal that will be summarily dismissed and which might prompt the government to rescind the agreement. Although a request to invoke a validly waived appellate right might lead to a duty of further consultation (a circumstance not alleged and not at issue in this case), it does not lead to a constitutional duty to file an appeal that might invalidate the plea agreement.

Trial counsel concluded that Garza's requested appeal of the sentences was barred by his valid prior waiver. Garza did not claim, much less demonstrate, that counsel's analysis was incorrect. Garza therefore failed to show that not filing the requested appeal of the sentences was deficient performance by trial counsel.

B. Defense Counsel Does Not Presumptively Prejudice His Client When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver

Even if counsel's performance could be deemed deficient, Garza failed to show he was prejudiced by

counsel's actions. To show prejudice Garza had the burden of showing counsel forfeited an appeal that Garza both wanted and to which he had a right. Before the Idaho courts Garza asserted he wanted an appeal of his sentences, but did not establish that he had a right to such an appeal. Before this Court he asserts he had a "right to appeal a number of fundamental issues," Brief of Pet. 16, but fails to show that he wanted, much less requested, such an appeal. Garza failed to establish the prerequisites of his claim of prejudice.

1. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "case-by-case prejudice inquiry" has "always been built into the *Strickland* test." *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993). There is a "narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense." *Nixon*, 543 U.S. at 190 (citing *United States v. Cronic*, 466 U.S. 648 (1984)). This exception applies a presumption of prejudice from deficient performance in three circumstances: (1) where there has been a denial of counsel; (2) where there has been "state interference with counsel's assistance"; and (3) where counsel has acted on an "actual conflict of interest." *Smith v. Robbins*, 528 U.S. 259, 287 (2000) (internal quotations omitted, citing *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 659 n.25).

In *Flores-Ortega*, the Court reaffirmed that a defendant claiming ineffective assistance of counsel generally must "show actual prejudice—'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" 528 U.S. at 481-82 (quoting *Strickland*, 466 U.S. at 694). The Court recognized, however, that where counsel has been "actually or constructively" denied altogether the resulting proceeding cannot be deemed reliable. *Id.* at 483. Thus, prejudice should be presumed where the defendant was denied an appeal that he "wanted at the time and to which he had a right." *Id.* The Court rejected a "*per se* prejudice rule" that would have entitled a petitioner to relief "solely upon a showing that counsel had performed deficiently" because it "ignore[d] the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." *Id.* at 484. The Court went on to hold that where a defendant showed that counsel failed to consult regarding an appeal, prejudice could be proved by showing that the deficient performance deprived him or her "of an appeal that he otherwise would have taken." *Id.*

2. Garza did not demonstrate the "critical requirement" that his counsel's actions caused the forfeiture of an appeal Garza both "wanted" and "to which he had a right." *Id.* at 483-84. Garza wanted an appeal of his sentences. Pet. App. 52a. He failed to show that he had a right to such an appeal in the face of his waiver. The loss of the proceeding that Garza wanted and requested, an appeal of his sentences, was due to

Garza's own waiver, not counsel's actions. Simply put, counsel did not, and could not, forfeit what Garza had already validly waived. Any alleged deficient performance did not, therefore, "actually cause the forfeiture of the defendant's appeal." *Flores-Ortega*, 528 U.S. at 483-84. The Idaho courts properly did not presume prejudice.

3. Garza contends that a "tripartite logic" of "forfeiture," "usurpation," and "unfairness" supports a presumption of prejudice in cases where counsel concludes the appeal his client wants is barred by a valid waiver of appeal rights. Brief for Pet. 15-33. It does not. To the contrary, each of the three considerations Garza cites cuts in favor of applying the general case-by-case prejudice inquiry.

a. The first part of Garza's suggested analysis is forfeiture. *Flores-Ortega* held that a defendant is denied counsel altogether, and therefore entitled to a presumption of prejudice, if counsel's performance did not merely lead to "a judicial proceeding of disputed reliability," but rather led "to the forfeiture of a proceeding itself." 528 U.S. at 483. A condition precedent to applying a presumption of prejudice is that the defendant "had a right" to the proceeding that he "wanted." *Id.* Otherwise, the defendant does not satisfy the "critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." *Id.* at 484.

Here the proceeding Garza "wanted" was an appeal of his sentences. But Garza had previously waived an appeal of his sentences as part of a valid plea agreement. Thus, the only proceeding he could have obtained was to respond to an order to show cause why the appeal was not barred by the waiver. *McKinney*, 396 P.3d at 1178. The opportunity granted by Idaho's procedure to show cause why the appeal is not barred was, in this case, neither an appeal of the sentences nor a viable pathway to an appeal of the sentences. Counsel's actions did not forfeit Garza's requested appeal of his sentences—that proceeding was waived by Garza.

Garza claims trial counsel's actions forfeited "a number of fundamental issues concerning the validity, scope and enforceability of [the] plea agreement and waiver." Brief for Pet. 16. This argument fails for three reasons.

First, the proper forfeiture analysis is whether "counsel's constitutionally deficient performance" deprived Garza "of an appeal that he otherwise would have taken." *Flores-Ortega*, 528 U.S. at 484. The presumption of prejudice applies only if counsel's deficient performance forfeited a proceeding the defendant "wanted" and "to which he had a right." *Id.* at 483. Garza alleged that the appeal he wanted and would have taken was an appeal of his sentences, with the ultimate goal of getting them run concurrently. R. 7, 207. He made no claim that he wanted or would have taken an appeal to challenge the validity, scope or enforceability of the plea agreement and waiver. Garza should not be presumed prejudiced because counsel

did not take an unbidden—and potentially ruinous—course of action.

Second, Garza's argument confuses the proceeding to establish an appeal right despite the waiver with the appeal itself. Although courts, quite understandably and properly, give defendants opportunities to challenge waivers of appeal rights, the proceeding to show an appeal right despite the waiver is not necessarily an appeal itself. *See, e.g.*, *United States v. Mabry*, 536 F.3d 231, 241-42 (3d Cir. 2008). Had counsel filed notices of appeal in the underlying cases, such would not have secured the requested appeal of his sentences, but only the opportunity to show cause why the waiver did not bar the appeal. *McKinney*, 396 P.3d at 1178. Only if Garza's counsel showed that Garza was asserting an unwaived claim, or that the waiver itself was invalid, could counsel have secured an appeal of the sentences as requested by Garza. *Id.* at 1178-79. A valid appeal waiver such as that entered by Garza "denies the defendant a decision on the merits." Pet. App. 26a. Garza provided "no reason to think his hoped-for appeals would not be dismissed as a result of his appeal waivers." Pet. App. 32a. Although Garza's trial counsel could have filed a notice of appeal, he could have secured an appeal of Garza's sentences only if he showed cause why that appeal issue was not waived. Because he could not have made that showing, trial counsel did not forfeit the already waived appeal.

Finally, adoption of Garza's argument that a challenge to the scope or validity of the plea waiver is always required despite the underlying appeal request

would undercut this Court's analysis in *Flores-Ortega*. There, in relation to determining if counsel had an obligation to consult with a client about an appeal, this Court stated, "the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." *Flores-Ortega*, 528 U.S. at 480. Garza's claim that his appeal waiver is irrelevant to his ineffective assistance of counsel claim cannot be reconciled with this language.

Trial counsel therefore did not "forfeit" the requested appeal of Garza's sentences.

b. The second part of Garza's "tripartite logic" argument is that counsel "usurp[ed] a decision committed to the client alone." Brief for Pet. 23-28 (italics omitted). As explained, *supra*, at 19-21, that argument fails because Garza personally made the decision not to appeal his sentences when he signed the plea agreements. Counsel simply held Garza to that choice. Had Garza wished to withdraw from the plea agreements, he could have asked counsel to do so. Counsel then would have had to evaluate whether any valid grounds to withdraw existed and would have had to confer with Garza about the potential risks, such as a potential the prosecution would reinstate the charges and enhancements that could result in a sentence of up to life. But Garza did not ask counsel to withdraw from the agreements. Having accepted (as far as trial counsel knew) the agreements to which he entered, he was bound by their terms. That was his choice, not counsel's.

c. The final part of Garza's "tripartite logic" is the claim that it would be "profoundly unfair" to require a petitioner in his circumstances to show prejudice. Brief for Pet. 29-33. This argument takes the Court's comments in *Flores-Ortega* out of context. Moreover, it is not "unfair" to require Garza to prove his claim of ineffective assistance of counsel.

In *Flores-Ortega*, this Court held that "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Flores-Ortega*, 528 U.S. at 484. The Court stated that showing nonfrivolous grounds for appeal would be "highly relevant" to establishing the petitioner probably would have appealed but for the lack of consultation. *Id.* at 485-86. The Court would not, however, "foreclose the possibility" of a defendant showing he probably would have appealed but for the lack of consultation even if he or she could not demonstrate a potentially meritorious appeal issue. *Id.* at 486. The Court reasoned, in part, that this was because "it is unfair to require an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit *before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal*." *Id.* (original emphasis omitted, emphasis added). The present case, however, is not about a failure to consult. Garza had the benefit of trial counsel, who considered Garza's request for an appeal of his sentences but concluded that the requested appeal was barred by Garza's appeal waiver.

Flores-Ortega's discussion of "unfairness" therefore has no application here.

Garza also had the assistance of post-conviction counsel[1] to establish that trial counsel's analysis was flawed and that Garza's requested appeal was not barred, but Garza and his counsel never argued that trial counsel's analysis was incorrect. Pet. App. 38a. It was not "unfair" to require Garza and his post-conviction counsel to present evidence that trial counsel's performance in evaluating the scope or validity of the appeal waiver was deficient, and that but for counsel's deficient evaluation there is a reasonable probability Garza would have been able to pursue his desired appeal.

Garza also contends that "the facts of this case illustrate the unfairness of requiring a defendant to identify and support the claims he would raise on appeal prior to receiving the assistance of appellate counsel." Brief for Pet. 32. He specifically points out that he checked "no" in relation to the question of whether he was waiving his appeal rights on a guilty plea questionnaire in one of the two underlying criminal cases. *Id.* As an initial matter, Garza's acknowledgement that the facts of his two cases differ, and that such

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[1] In Idaho a post-conviction petitioner is entitled to appointment of counsel if he or she "alleges facts to raise the possibility of a valid claim." *Charboneau v. State*, 102 P.3d 1108, 1112 (Idaho 2004). After Garza filed his *pro se* petition the district court appointed counsel, and Garza was represented through every stage of the post-conviction proceedings. R. 24, 224.

difference might matter for the analysis, merely underscores the propriety of a case-by-case prejudice evaluation.

Moreover, it was not "unfair" to require Garza to demonstrate that the "no" check showed that his counsel was ineffective under the facts of this case. If the "no" answer were a basis for challenging the voluntariness of his waiver, to show prejudice Garza would have been required to establish that he would have actually challenged the voluntariness of his waiver despite the likelihood that he would have lost the benefit of his plea agreement. *See Flores-Ortega*, 528 U.S. at 485-86 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (requiring petitioner to demonstrate that he would have "insisted" on invoking the forfeited proceeding)). Rather than attempting to use this anomaly in the record to establish his claim, however, Garza invoked a presumption and made no effort to actually prove deficient performance or prejudice. It was not "unfair" to require Garza to prove under *Strickland* that the "no" answer, or any other fact in either of the cases, meant that counsel had deficiently evaluated Garza's appeal rights and there was a reasonable probability that Garza would have pursued a particular appeal but for the deficient performance.[2]

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[2] As it turns out, the Idaho district court found on post-conviction review that, although Garza had pointed out the negative answer on the guilty plea questionnaire, he "never" contended at "any stage of these post-conviction cases" that he "did not appreciate or understand the appeal waivers when he entered his pleas." Pet. App. 31a.

Requiring Garza to show that trial counsel was ineffective in this case is not more onerous or unfair than requiring petitioners in other contexts to prove both prongs of *Strickland*. This Court has rejected application of the *Cronic* presumption, and required proof under *Strickland*, in all but a few narrow fact patterns. *Wright v. Van Patten*, 552 U.S. 120, 124 (2008). It has rejected applying any presumption of prejudice where counsel failed "to adduce mitigating evidence" and waived closing argument, *Bell v. Cone*, 535 U.S. 685, 697 (2002); where counsel failed to file a timely motion to suppress before trial, *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); where counsel in a capital case conceded guilt (but argued against application of the death penalty), *Nixon*, 543 U.S. at 189-92; and where counsel failed to file a merits brief on appeal after concluding no issues were meritorious, *Robbins*, 528 U.S. at 285-88. Even if Garza's fairness argument were relevant, it is not unfair to require him to support his claims with evidence and ultimately prove that counsel was deficient in his assessment of whether Garza could appeal his sentence and that the deficient performance resulted in the forfeiture of appeal proceedings Garza both wanted and had a right to.

C. Practical Considerations Do Not Support Adopting A Presumption Of Prejudice Here

Garza contends that applying the standard *Strickland* analysis "imposes heavy burdens on both the litigants and the courts" and that it is "far more efficient simply to grant a defendant a new appeal once he has

demonstrated that his attorney disregarded his instruction to file a notice of appeal." Brief for Pet. 37-38. Garza is wrong on the law and the facts.

On the law, this Court does not deem a class of attorney errors to be presumptively prejudicial merely because a case-by-case prejudice inquiry would be more burdensome on the parties and the courts. Rather, attorney error is presumptively prejudicial if it is "tantamount to a denial of counsel." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1915 (2017) (Alito, J., concurring). The three categories of cases meeting this demanding standard are actual denial of counsel, government interference with counsel's assistance, and an actual conflict of interest. *Robbins*, 528 U.S. at 287. Even if Garza were correct, and it would take more judicial and party resources to litigate his claim of ineffective assistance of counsel than it would to simply grant him an appeal, that would not put him in any of the categories where a presumption is appropriate.

On the facts, it is far from clear that Idaho, or any other jurisdiction, would conserve resources by simply granting appeals in cases such as this one. As set forth above, applying a case-by-case *Strickland* standard requires the petitioner to prove counsel forfeited an appeal that the petitioner wanted and to which he had a right.[3] Such is not more onerous or resource intensive

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[3] Garza contends the ruling of the Idaho Supreme Court requires demonstration of "a non-frivolous appellate claim that is not barred by his appeal waiver." Brief for Pet. 37. That is incorrect. The court ruled that a petitioner must demonstrate an issue not rendered frivolous because it was barred by the appellate

than other claims of ineffective assistance of counsel, such as claims counsel was ineffective in relation to a guilty plea, *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *Hill*, 474 U.S. at 58; *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010); for not filing a timely motion to suppress, *Kimmelman*, 477 U.S. at 375; at sentencing, *Glover v. United States*, 531 U.S. 198, 204 (2001); or at trial, *Nixon*, 543 U.S. at 189–192.

Garza contends that requiring any showing other than counsel did not file a notice of appeal would be "virtually impossible" because of the "almost infinite potential for variation among appeal waivers." Brief for Pet. 36. This gets things backwards. It is the "infinite variety" of potential errors by defense counsel that mandates a case-by-case prejudice analysis in the first place. *Strickland*, 466 U.S. at 693. Evaluating whether counsel forfeited an appeal that his or her client wanted and had a right to is no more "impossible" than making the prejudice determination with respect to attorney errors in plea negotiations, pre-trial motions, or trials. For each situation, there is an "almost infinite potential for variation." Yet courts regularly determine

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waiver. The decision of the Idaho Supreme Court does not require a petitioner to demonstrate a likelihood that he or she would have prevailed on the merits of an appeal issue. Pet. App. 10a-11a. *See also id.* at 38a (district court required Garza to show "non-frivolous grounds for asking the appellate court to decide his appeal on the merits"). The merits of any appellate claim are irrelevant to the analysis. The only question is whether counsel deprived the client of the right to have those merits decided by an appellate court.

whether counsel's performance was deficient and the defendant thereby prejudiced.

Garza nonetheless argues that habeas and post-conviction proceedings are necessarily more resource intensive because petitioners are "almost always acting *pro se*." Brief for Pet. 37. This is not true in Idaho, where appointment of counsel is required upon a showing of "the possibility of a valid claim." *Charboneau*, 102 P.3d at 1112. Nor is it true in this case, because Garza had appointed counsel to represent him. Even if accurate in relation to other cases and other jurisdictions, this argument does nothing to distinguish this case from the vast majority of claims where *Strickland* requires proof of deficient performance and prejudice. This Court has recognized that states and the federal government properly channel ineffective assistance claims to post-conviction proceedings, rather than to appeals. *See Martinez v. Ryan*, 566 U.S. 1, 13 (2012); *Massaro v. United States*, 538 U.S. 500, 504-05 (2003). They do so because non-record information is usually required to resolve the claims. Defendants in Garza's situation are no differently situated than other defendants who wish to assert ineffectiveness-of-trial-counsel claims.

Ultimately it is not an onerous burden to require a petitioner to show that trial counsel's determination that the requested appeal was barred by the waiver was deficient, and that such deficiency caused the forfeiture of an appeal the defendant wanted and to which he had a right. Here counsel's performance was not

deficient because he accurately concluded that the requested appeal was within the scope of a valid waiver. If counsel had been incorrect, however, and the appeal was outside the scope of the waiver, or the waiver was invalid, Garza would have met his burden on the first prong of *Strickland*. And in that situation, it would hardly have been difficult or resource intensive for Garza to have shown that he would have both wanted and had a right to the appeal he requested.

Applying the standard case-by-case *Strickland* analysis would not be unfair for still another reason. As this Court has explained, "the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). Presuming prejudice where counsel fails to comply with defendants' requests to appeal waived issues does not remotely meet that test. In only the rarest of cases will a defendant surmount the waiver and gain appellate review of a claim covered by an appeal waiver. And even claims falling outside the waiver rarely succeed. Although one of Garza's amici points to examples of successful post-appeal-waiver claims, see Amicus Br. of IACDL at 11-20, the amicus fails to divulge how often defendants assert such claims and how often they fail. In the state's experience, defendants' efforts to withdraw from plea agreements based on claims of involuntariness or ineffective assistance of counsel rarely succeed. *See, e.g.*, *State v. Murphy*, 872

P.2d 719, 720 (Idaho 1994) ("the ability to waive the right to appeal as part of a negotiated plea agreement serves an important public interest").

Garza argues it is "more efficient" to merely proceed with whatever proceedings would follow the filing of a notice of appeal, because this would avoid having to duplicate proceedings and because courts generally have a mechanism for the quick processing of waived appeals. Brief for Pet. 37-40. That appellate courts have developed procedures to swiftly dispense with appeals rendered frivolous by appeal waivers is hardly grounds for doing away with *Strickland* proof. More importantly, a standard that encourages frivolous appeals has no real hope of conserving judicial resources. *See Robbins*, 528 U.S. at 294 ("no one has a right to a wholly frivolous appeal") (Souter, J., concurring) (citing *Anders v. California*, 386 U.S. 738, 742 (1967)). That most appeals in the face of waivers can be quickly and efficiently dealt with (presumably because most should be summarily dismissed) is not a ground for presuming ineffective assistance of counsel.

* * *

Garza claimed that his trial counsel was ineffective for not appealing Garza's sentences. There is no dispute that Garza's counsel correctly concluded he could not have obtained appellate review of Garza's sentences because such was within the scope of Garza's valid appeal waiver. Nevertheless, relying on *Flores-Ortega*, Garza claims that his counsel's performance

was deficient and that he must be presumed prejudiced. *Flores-Ortega*, however, deemed counsel's failure to file a requested appeal deficient only where the filing of an appeal was merely ministerial. Likewise, it would only presume prejudice if counsel's deficient performance forfeited a proceeding Flores-Ortega wanted and had a right to. Neither feature exists here. The presence of a valid appeal waiver in Garza's plea agreement rendered the filing of an appeal of the sentences more than merely ministerial. And counsel's actions did not cause forfeiture of an appeal Garza had the right to assert because he affirmatively waived that right. The Idaho Supreme Court faithfully adhered to this Court's general precedents requiring a case-by-case, fact-based analysis and correctly declined to presume counsel provided ineffective assistance of counsel.

CONCLUSION

The decision of the Idaho Supreme Court should be affirmed.

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IN THE

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v.

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Respondent.

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TABLE OF CONTENTS

Page

Table Of Authorities ii

Introduction 1

Argument 3

I. Prejudice Should Be Presumed When An Attorney Disregards His Client's Instruction To Appeal Following An Appeal Waiver 3

A. By Failing To Appeal, An Attorney Forfeits A Proceeding To Which The Defendant Was Entitled 3

B. An Attorney's Refusal To File An Appeal Requested By His Client Usurps A Decision Committed To The Client Alone 9

C. It Would Be Profoundly Unfair To Make A Defendant's Right To Appeal Dependent On His Ability To Articulate A Viable Issue For Appeal 14

II. Denying A Presumption Of Prejudice Would Be Inefficient And Unworkable 17

III. Even Under The Other Side's Rules, Mr. Garza Is Entitled To Have His Appeal Reinstated 21

Conclusion 23

TABLE OF AUTHORITIES

CASES: Page(s)

Anders v. *California*,
386 U.S. 738 (1967) 2, 5

Bell v. *Cone*,
535 U.S. 685 (2002) 10

Bousley v. *United States*,
523 U.S. 614 (1998) 16

Boykin v. *Alabama*,
395 U.S. 238 (1969) 9

Class v. *United States*,
138 S. Ct. 798 (2018) 8, 9

Evitts v. *Lucey*,
469 U.S. 387 (1985) 2, 17

Faretta v. *California*,
422 U.S. 806 (1975) 10

Ferrier v. *State*,
25 P.3d 110 (Idaho 2001) 23

Jones v. *Barnes*,
463 U.S. 745 (1983) ..... *passim*

Lee v. *United States*,
137 S. Ct. 1958 (2017) 8

McCoy v. *Louisiana*,
138 S. Ct. 1500 (2018) ..... *passim*

Nunez v. *United States*,
554 U.S. 911 (2008) 20

Penson v. *Ohio*,
488 U.S. 75 (1988) 5, 6

Roe v. *Flores-Ortega*,
528 U.S. 470 (2000) ..... *passim*

Rose v. *Lundy*,
455 U.S. 509 (1982) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Smith v. *Robbins*,
528 U.S. 259 (2000) 5

State v. *Peterson*,
226 P.3d 535 (Idaho 2010) 15

State v. *Taylor*,
336 P.3d 302 (Idaho Ct. App. 2014) 7

United States v. *Capaldi*,
134 F.3d 307 (5th Cir. 1998) 15

United States v. *Lee*,
888 F.3d 503 (D.C. Cir. 2018) 15

United States v. *Medina-Carrasco*,
815 F.3d 457 (9th Cir. 2016) 16

Watson v. *United States*,
493 F.3d 960 (8th Cir. 2007) 21

RULES:

Fed. R. Crim. P. 11(b)(1)(A)-(F) 9

Idaho App. R. 17(f) 6

Idaho App. R. 19 6

Idaho App. R. 25 6

Idaho Crim. R. 11(c)(3) 9

S. Ct. R. 14 22

OTHER AUTHORITY:

U.S. Dep't of Justice, United States Attorneys' Manual § 2-2.132 (2018) 12

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The State of Idaho and the Solicitor General concede that a defendant who signs an appeal waiver retains the right to bring numerous claims on appeal, including challenges to the validity, scope, and enforceability of his plea or waiver. *See* U.S. Br. 23; Resp. Br. 26; Pet'r Br. 16-20. And they acknowledge that under this Court's decision in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), prejudice is presumed when an attorney deprives his client of an appeal to which the client has a right. U.S. Br. 13; Resp. Br. 8.

Those concessions—which markedly depart from what the State argued below—should resolve this case. An attorney who betrays her client's instruction to appeal deprives that client of his right to an appellate proceeding in which he may raise his retained claims. Therefore, prejudice must be presumed.

Rather than concede error (as past Federal administrations have done in just this respect, *see infra* pp. 20-21), the State and the Solicitor General argue for new rules, never adopted by any court. They claim that an appeal waiver allows an attorney to ignore her client's instruction to appeal unless the defendant identifies *unwaived* issues he wishes to pursue. U.S. Br. 21-22; Resp. Br. 22.

But *Flores-Ortega* itself arose in the context of a guilty plea that—with or without an appeal waiver—"reduces the scope of potentially appealable issues." 528 U.S. at 480. Nonetheless, the Court held the presumption of prejudice does not depend on whether a defendant can "specify the points he would raise" on appeal, *id.* at 486; it applies whenever a client has "instruct[ed] counsel to perfect an appeal." *Id.* at 485.

Nor is that the only problem with the other side's position. By allowing an attorney to ignore an instruction to appeal if she believes the defendant intends to raise a waived issue, Idaho and the Solicitor General give the attorney the power to veto a defendant's decision to appeal. That is incompatible with *Anders* v. *California*, 386 U.S. 738 (1967), which recognized the need for a judicial check on any such unilateral decisionmaking by counsel. A defendant may not be so readily deprived of his best opportunity to "demonstrate that [his] conviction, with its consequent drastic loss of liberty, is unlawful." *Evitts* v. *Lucey*, 469 U.S. 387, 399-400 (1985).

The State and the Solicitor General also conflate two fundamentally distinct decisions. The Sixth Amendment entrusts to the client alone the decision *whether to appeal*; the question of *which issues to*

raise on appeal is committed to the defendant's appellate attorney. *See Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). The State and the Solicitor General would upend that basic allocation of responsibility between attorney and client, allowing trial counsel to usurp her client's decision to pursue an appeal when the client is unable to perform the appellate advocate's task of identifying suitable appellate issues.

There is no justification for the Court to depart from its precedents in this manner. The other side's rules would create more complexities for litigants and courts, not fewer. And the State's late-breaking effort to relitigate the facts of Mr. Garza's case—by erroneously claiming that Mr. Garza specifically instructed his attorney to raise a waived issue—is both inappropriate and immaterial. The judgment should be reversed.

ARGUMENT

I. Prejudice Should Be Presumed When An Attorney Disregards His Client's Instruction To Appeal Following An Appeal Waiver.

A. By Failing To Appeal, An Attorney Forfeits A Proceeding To Which The Defendant Was Entitled.

Flores-Ortega offered three independent rationales for holding that a defendant is entitled to a presumption of prejudice when his attorney disregards his instruction to appeal. Pet'r Br. 13-14. The first—and the only one to which the other side devotes any meaningful attention—is that by failing to file a requested notice of appeal, an attorney causes the forfeiture of an appellate proceeding "to which [the defendant] had a right." *Flores-Ortega*, 528 U.S. at 483.

In the proceedings below, the State argued this rationale did not apply to Mr. Garza because his appeal waiver forfeited *any* right to an appeal. That is the reasoning the court below accepted, Pet. App. 14a, and that is what the State argued in its brief in opposition, BIO 9, 15-16. It is also wrong. As all parties now acknowledge, a defendant who signs an appeal waiver retains the right to appeal several significant issues, including the validity and scope of the plea or waiver itself. *See* Pet'r Br. 16-20; U.S. Br. 23; Resp. Br. 26. Consequently, when Mr. Garza's attorney ignored his instruction to notice an appeal, the attorney forfeited the appellate proceeding to which Mr. Garza was entitled, triggering the presumption of prejudice.

To avoid this conclusion, the State and the Solicitor General propose alternative grounds for affirmance. The State now argues that an attorney's failure to file a notice of appeal does not cause the forfeiture of a proceeding if the defendant signs an appeal waiver and then instructs his attorney to appeal an issue within the scope of that waiver. Resp. Br. 22. The Solicitor General argues that a proceeding is forfeited only if the defendant instructs his trial counsel to appeal an unwaived issue, or if on postconviction review the defendant can identify a nonfrivolous unwaived issue that his appellate counsel "would have raised" on appeal. U.S. Br. 21-22.

Both of these new rules are as misguided as the reasoning they replace. When an attorney fails to file a notice of appeal, she deprives her client of a proceeding in which an appellate court reviews the defendant's claims and decides whether they are, in fact, waived or—if they are preserved—whether they have merit. To camouflage this deprivation, Idaho

and the Solicitor General attempt to reassign the resolution of the waiver question to trial counsel. They suggest that if trial counsel concludes the defendant is attempting to appeal a waived issue, she may veto any further proceedings herself. But this Court has consistently rejected analogous attempts to substitute the unilateral views of counsel for considered review by an appellate court. *See Anders*, 386 U.S. 738; *Penson* v. *Ohio*, 488 U.S. 75 (1988).

In *Anders*, this Court held that even if a defendant's appellate attorney "finds his [client's] case to be wholly frivolous," the attorney may not simply refuse to pursue the case. 386 U.S. at 744. Instead, the attorney must follow sufficient procedures, such as filing a brief "referring to anything in the record that might arguably support the appeal," to enable "the court—not counsel— * * * to decide whether the case is wholly frivolous." *Id.*; *see Smith* v. *Robbins*, 528 U.S. 259, 280 (2000) (holding that a State complies with *Anders* if it "requires both counsel and the court to find the appeal to be lacking in arguable issues"). By the same token, an attorney may not decline to pursue an appeal based solely on her assessment of the nature of the defendant's claims and the scope of the waiver; she must file a notice of appeal, and the appellate court will make its own assessment with the aid of counsel.

Both Idaho and the Solicitor General also assume that the defendant decides what issues to appeal before his attorney files the notice. That is doubly incorrect.

First, while a defendant has the right to decide *whether* to "take an appeal," he does not select *what*

issues to appeal. *Barnes*, 463 U.S. at 751-52. His "appellate advocate" does. *Id.* Indeed, in *Barnes* this Court rejected the contention that the Sixth Amendment requires an attorney to press any appellate issue "requested by the client"; that is "a matter of professional judgment" reserved for appellate counsel alone. *Id.* at 751.

Second, the decision of what issues to raise on appeal is not made at the notice-of-appeal stage. While trial counsel may begin to assess potentially appealable issues at that stage, that preliminary review is in no way binding.[1] After an appeal is perfected, *appellate* counsel engages in "careful advocacy" to ensure "substantial legal and factual arguments are not inadvertently passed over" or "forgone." *Penson*, 488 U.S. at 85. Further, in Idaho, as in federal court, indigent defendants generally obtain access to the record required to identify issues for appeal only after a notice of appeal is filed. *See* Idaho App. R. 19, 25.

Accordingly, the issues a defendant may specify when he instructs his attorney to notice an appeal cannot themselves determine whether the failure to file the notice forfeits a proceeding because those issues do not necessarily reflect, much less control,

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[1] Idaho Appellate Rule 17 provides that a notice of appeal must include a "preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal," but mandates that "any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal." Idaho App. R. 17(f). Attorneys comply with this rule simply by identifying the decision being appealed. *E.g.*, CR 197 (identifying "dismissal of Petitioner's Postconviction Petition" as the issue on appeal).

what arguments will actually be pressed on appeal. What matters in determining whether an attorney has deprived her client of a proceeding is whether the defendant "instruct[ed] counsel to initiate an appeal." *Flores-Ortega*, 528 U.S. at 477.

The State and the Solicitor General attempt to overcome these obstacles by redefining the nature of the proceeding in question. The State repeatedly refers to "the appeal" forfeited by Mr. Garza's attorney as "an appeal of his sentence." Resp. Br. 11, 13, 17. The Solicitor General similarly refers to "an appellate merits proceeding." U.S. Br. 18, 21, 22. But there is no separate appellate proceeding for sentencing issues or for "appellate merits review." There is simply *an appeal*, in which the defendant would be appointed counsel to review and press the full spectrum of claims available to the defendant.[2]

The Solicitor General's own analogies illustrate the distinction. The Solicitor General asserts that "[n]o one would say * * * that a defendant is prejudiced by his attorney's refusal to file an appeal in the wrong court" or to "notice a requested appeal from a clearly non-appealable order." U.S. Br. 20. But in those cases, the defendant would have no right to the requested appellate proceeding *at all*. All agree here

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[2] The State suggests Idaho defendants who sign an appeal waiver undergo some threshold proceeding before gaining the right to an appeal. Resp. Br. 26; *see also* U.S. Br. 17-18. That is incorrect. Idaho courts regularly consider whether a defendant has raised a waived issue after full briefing. *See State* v. *Taylor*, 336 P.3d 302, 304-305 (Idaho Ct. App. 2014) (rejecting the assertion that the applicability of an appeal waiver must be assessed through a pre-briefing motion to dismiss); *see also* Pet'r Br. 16-17 & n.4; Cert. Reply 8-9.

that a defendant has a right to an appeal following an appeal waiver. The waiver simply narrows the claims he may successfully bring.

The Solicitor General attempts to sidestep these problems by acknowledging that a defendant who has not instructed his attorney to appeal an unwaived issue may still be entitled to a presumption of prejudice if he can point to a "nonfrivolous" unwaived claim he would have raised on appeal. U.S. Br. 21-22. But a court "cannot" predetermine the merits of a proceeding "that never took place." *Flores-Ortega*, 528 U.S. at 483. The presumption of prejudice may not be made to turn on the hypothetical merits of the forfeited appeal. *See Lee* v. *United States*, 137 S. Ct. 1958, 1966 (2017).

Finally, *Flores-Ortega* itself confirms the State's and the Solicitor General's approach cannot be correct. There, the defendant's entry of a guilty plea substantially "reduce[d] the scope of potentially appealable issues." 528 U.S. at 480; *see also Class* v. *United States*, 138 S. Ct. 798, 808 (2018) (Alito, J., dissenting) (observing that a defendant who pleads guilty waives "all nonjurisdictional claims"). Yet the Court held prejudice is presumed without any requirement that a defendant identify "non-waived" issues he would have raised on appeal. U.S. Br. 8. There is no reason a different rule should apply in the case of an appeal waiver, which differs from a guilty plea only in degree, and preserves those claims most fundamental to the defendant's liberty and the integrity of the judicial process. Indeed, *Flores-Ortega* specifically referred to appeal waivers as part of the spectrum of guilty pleas but never suggested a different framework should apply to pleas that include those "express[ ]" waivers. 528 U.S. at 480.

The Solicitor General's only response, in a footnote, is to say that a guilty plea "preclu[des]" a defendant from raising most claims on appeal rather than "waiv[ing]" those claims. U.S. Br. 20 n.3. Even if this hyperformalistic distinction were accurate, it would be irrelevant: A guilty plea forecloses "merits consideration" of certain claims, which is all the Solicitor General considers germane. *See* U.S. Br. 21. In any event, the distinction is wrong. Guilty pleas effect a "waiver" of claims, just like appeal waivers. *E.g.*, *Class*, 138 S. Ct. at 805 (explaining that "[t]he Government is correct that a guilty plea does implicitly waive some claims"); *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969) (recognizing that "a plea of guilty" entails "effective waiver"). Defendants are advised as much when they plead guilty, both in Idaho and in the federal system. *See* Fed. R. Crim. P. 11(b)(1)(A)-(F); Idaho Crim. R. 11(c)(3).

B. An Attorney's Refusal To File An Appeal Requested By His Client Usurps A Decision Committed To The Client Alone.

The other side's position should be rejected for a second, independent reason: It would permit an unconstitutional encroachment on defendant autonomy.

The State and Solicitor General concede—as they must—that the decision whether to appeal ultimately "rests with the defendant." *Flores-Ortega*, 528 U.S. at 479; *see* Resp. Br. 19; U.S. Br. 26. Thus, when a criminal defendant "expressly" instructs his attorney to appeal, counsel "must abide by that [decision] and may not override it." *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1509 (2018). When the attorney instead "usurp[s] control" of that fundamental

choice, the "violation of [the defendant's] protected autonomy right [is] complete," and the defendant is entitled to relief without a requirement that he show any further prejudice. *Id.* at 1511; *see Bell* v. *Cone*, 535 U.S. 685, 686 (2002) (recognizing that *Cronic* applies where an attorney's violation of the right to counsel is "complete"); Cato Institute Br. 2-15.

The State and Solicitor General nonetheless contend a defendant may be barred from obtaining relief where his attorney disregards his instruction to appeal, if the defendant previously entered a plea agreement with an appeal waiver. They defend this rule by pointing to the potential negative consequences of pursuing an appeal when doing so might be viewed as a breach of a plea agreement. Resp. Br. 18; U.S. Br. 18, 20. That argument both misunderstands the nature of the autonomy right and mischaracterizes what is necessary to breach a plea agreement.

A defendant retains his autonomy right to make the fundamental choices about his defense even where the defendant's decision may be imprudent—indeed, even fatal. *See Faretta* v. *California*, 422 U.S. 806, 834 (1975) (recognizing that although a defendant may act "ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law' "). In *McCoy*, for example, the Court held the defendant had an autonomy right to advance a theory of innocence even though counsel "reasonably assess[ed]" that "a concession of guilt" was "best suited to avoiding the death penalty." 138 S. Ct. at 1508. It would defy logic to hold that a defendant retains his right to make a fundamental choice where he "risk[s]

death," *id.*, but not where he risks his plea agreement.

Nonetheless, the State (but not the Solicitor General) goes even further. Idaho explicitly contends that the risk of breach means an attorney acts in a professionally *reasonable* manner when she overrules her client's instruction to appeal if she believes her client wishes to appeal a waived issue. Resp. Br. 12-21. But *McCoy* makes clear an attorney is obligated to honor her client's wishes when a question is committed to the defendant, even if the attorney "reasonably assess[es]" that her client's decision is strategically unwise. 138 S. Ct. at 1508. It is necessarily deficient performance for an attorney to usurp that decision, even with the best of intentions. In fact, the deficient performance inquiry is not even before this Court: The Question Presented asks only if the presumption of prejudice applies. Pet. i.

The State and the Solicitor General also contend the "very filing" of a notice of appeal might put a defendant in breach of his plea agreement. U.S. Br. 9; Resp. Br. 17-18. It is hard to see how that could be. A notice of appeal is a piece of paper filed to preserve the client's opportunity to appeal. And since all agree that a defendant retains several claims under even the most broadly written waiver, no breach would be effectuated merely by filing that piece of paper. Indeed, the Federal Government itself recognizes that noticing an appeal has no legal consequence apart from preserving the client's right to appeal; prosecutors automatically notice "protective" appeals of criminal cases, no matter their merit, if the Solicitor General has not made an appeal decision before the jurisdictional deadline. *See* U.S.

Dep't of Justice, United States Attorneys' Manual § 2-2.132 (2018).

Idaho and the Solicitor General make a few further attempts to reconcile their position with this Court's autonomy precedents. None succeeds.

First, they contend that an attorney who ignores her client's instruction to appeal does not usurp the defendant's choice because the defendant "made the decision not to appeal * * * when he signed the plea agreements." Resp. Br. 27; U.S. Br. 25-26. But that (again) mischaracterizes the import of an appeal waiver: Because a defendant who signs an appeal waiver agrees only to forgo certain claims, the waiver cannot reflect a defendant's choice to forgo an appeal altogether.

Second, the State suggests it would actually *contravene* the autonomy rationale to permit a defendant to obtain an appeal, since his appellate attorney may press issues different from the waived issue the defendant wishes to raise. Resp. Br. 19-20. But that again confuses the question of *whether* to appeal with the decision of *what* to appeal. *Barnes*, 463 U.S. at 751. The client has the autonomous right to decide the "objective of the defense" by deciding whether to press or "forgo an appeal." *McCoy*, 138 S. Ct. at 1508. But it is for the attorney to decide "how best to *achieve* a client's objectives"—by deciding, for example, "what arguments to pursue." *Id.*

Third, the Solicitor General argues that *Flores-Ortega* "was not premised on autonomy interests" at

all. U.S. Br. 25. *Flores-Ortega* says otherwise.[3] In recognizing that an attorney may not ignore her client's instruction to appeal, the Court relied on precedent establishing that the defendant "has [the] ultimate authority" to make the "fundamental decision whether to take an appeal." 528 U.S. at 477 (citing *Barnes*, 463 U.S. at 751). The Court also repeatedly emphasized that the "decision to appeal rests with the defendant." *Id.* at 479, 485. And, in defining the showing required to presume prejudice, the Court spoke exclusively in terms of the defendant's autonomous decision to appeal—holding that a defendant must show he "want[ed]" or "would have insisted on" an appeal. *Id.* at 480, 485.

Fourth, the Solicitor General suggests in passing that *McCoy* is irrelevant because it did not involve a *Strickland* analysis. U.S. Br. 25. That gets things backwards. The autonomy interest in *McCoy* was derived from the Sixth Amendment right to counsel and the decisions that had previously been recognized as entrusted to the client, including the choice whether to "forgo an appeal." 138 S. Ct. at 1508. Indeed, the Court explicitly relied on cases finding overrides of such decisions presumptively prejudicial under *Strickland* and *Cronic*. *See id.* at 1511 (citing

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[3] So did the United States as *amicus curiae* in *Flores-Ortega*. The Solicitor General grounded the presumption of prejudice *exclusively* in terms of defendant autonomy, arguing that counsel's refusal to notice a requested appeal was "[t]he most obvious" case of ineffective assistance, and that presuming prejudice "makes sense," because "the client has made a decision that is his to make." U.S. Br. 17, *Flores-Ortega*, 528 U.S. 470 (2000) (No. 98-1441), 1999 WL 33611343, at *17, *18-19.

Cooke v. *State*, 977 A.2d 803, 849 (Del. 2009)); *id.* at 1507 (citing *State* v. *Carter*, 14 P.3d 1138, 1148 (Kan. 2000)). It would make little sense to disregard *McCoy*'s admonition against interfering with a defendant's autonomy where—as here—an attorney has *directly* usurped one of the fundamental choices committed to the defendant.

C. It Would Be Profoundly Unfair To Make A Defendant's Right To Appeal Dependent On His Ability To Articulate A Viable Issue For Appeal.

The *Flores-Ortega* Court held that it would be "unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." 528 U.S. at 486. After all, "[t]here can hardly be any question about the importance of having [an] appellate advocate examine the record with a view to selecting the most promising issues" to appeal. *Barnes*, 463 U.S. at 752. And it is plainly inequitable to require a defendant with no legal training and potentially limited facility with English to "specify the points he would raise" on appeal, particularly during the short period before the notice-of-appeal deadline, when defendants in transit to prison may have difficulty communicating with counsel at all. *Flores-Ortega*, 528 U.S. at 474, 486 (citation omitted).

It would be *more*, not less, unfair to require a defendant who has signed an appeal waiver to specify unwaived issues for appeal in order to obtain his appeal as of right. The very factors that might make a defendant's plea agreement unknowing or involun-

tary—language difficulties, mental handicaps, or incompetence of trial counsel, to name a few—may similarly make it hard for the defendant to recognize or articulate claims that are preserved despite the appeal waiver. And appeal waivers themselves are often difficult to interpret, requiring a review of the "entire record" that indigent clients are ill-suited to perform themselves. *United States* v. *Lee*, 888 F.3d 503, 505 (D.C. Cir. 2018); *see* Pet'r Br. 31.[4]

The State and the Solicitor General ignore all of this. The State's rule deprives a defendant of an appeal unless he can show that he did not instruct his attorney to appeal a waived issue, Resp. Br. 22, forcing a defendant to forfeit an appeal merely because he was unable to distinguish waived from unwaived issues in the brief time allotted—and without the assistance of appellate counsel. That is plainly contrary to *Flores-Ortega* and basic principles of fairness.

The Solicitor General's rule is equally problematic. It would require a defendant to either inform his attorney of an unwaived claim he wished to bring, or to identify a nonfrivolous claim during postconviction proceedings. But *Flores-Ortega* specifically recog-

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[4] The State repeatedly asserts, for instance, that sentencing issues would "plainly" be within the scope of Mr. Garza's waiver. Resp. Br. 10. But the waiver states only that Mr. Garza "waives his right to appeal." Pet. App. 44a, 49a. Courts consistently hold that prospective waiver of sentencing issues "must be explicit; it will not be deemed implicit in a general waiver." *E.g. United States* v. *Capaldi*, 134 F.3d 307, 308 (5th Cir. 1998); *see also State* v. *Peterson*, 226 P.3d 535, 537 (Idaho 2010) (recognizing that plea agreements are construed strictly in favor of the defendant).

nized the inequity in requiring a defendant to "specify the points he would raise," and to do so "before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds." 528 U.S. at 486.

The State and the Solicitor General barely attempt to justify the profound inequity of their positions. The Solicitor General suggests that a defendant whose plea agreement contains an appeal waiver "presumably contemplated" the issues he would be waiving and is therefore "much better situated" to articulate issues he would want to appeal. U.S. Br. 27. That argument strains credulity. For one thing, a defendant who signs an appeal waiver often does so *before* important details are decided, including his sentence, any fines or restitution, and conditions for release. *See, e.g.*, *United States* v. *Medina-Carrasco*, 815 F.3d 457, 463-469 (9th Cir. 2016) (Friedman, J., dissenting). And there is no reason to think signing language saying one "waives [the] right to appeal," Pet. App. 44a, 49a, imbues a defendant with the expertise necessary to identify the issues that remain available to him on appeal and the ability to specifically articulate those issues to trial counsel.

The Solicitor General also suggests that depriving a defendant of an appeal is not inequitable because at least some claims challenging the voluntariness of a plea or waiver may be brought in postconviction proceedings. U.S. Br. 27. In fact, however, courts typically find those claims procedurally defaulted if they have not been brought first on direct appeal. *See Bousley* v. *United States*, 523 U.S. 614, 621 (1998). And even if a defendant tries to bring his claims on postconviction, he will face obstacles he would not have faced on appeal. He will have no

right to counsel, and his claims will be subject to the stringent procedures and standards that govern habeas proceedings. *See* IACDL Br. 22-27. For these reasons, the Court has recognized the essential role of direct appeal in "assur[ing] that only those who are validly convicted have their freedom drastically curtailed." *Evitts*, 469 U.S. at 399-400.

II. Denying A Presumption Of Prejudice Would Be Inefficient And Unworkable.

1. The State's and the Solicitor General's approach would also be cumbersome and inadministrable in practice.

For defendants, the other side's rules would elevate form over substance. They would grant a presumption of prejudice to defendants who knew to use the right verbal formula—telling an attorney to challenge, for instance, the "validity" of a plea, or perhaps asking to "appeal issues outside the scope of my waiver"—but deny the same presumption to defendants unaware of the need to avoid mention of waived issues. This would result in a "trap [for] the unwary," causing indigent defendants to forfeit their rights simply because they did not know what words to use. *Rose* v. *Lundy*, 455 U.S. 509, 530 (1982) (Blackmun, J., concurring).

The other side's approach would also create difficult obligations for already overburdened trial attorneys during the notice-of-appeal window. Today, although appointed counsel may, and ideally would, advise their clients about the benefits and drawbacks of appealing, they need simply follow whatever decision the client makes regarding whether to appeal. *See Flores-Ortega*, 528 U.S. at 477, 480. The other side's rules would greatly complicate matters.

When a defendant who signed an appeal waiver instructed her attorney to appeal, the attorney would not simply be required to comply. Instead, she would need to rapidly determine whether the issues her client expressed interest in raising were barred by the waiver—a determination often requiring analysis of the record (which generally would not even be available), the text of the waiver, and the applicable law. *See* Pet'r Br. 34-35. The attorney would further be required to parse her client's words to determine whether they encompassed a request to appeal issues outside the scope of the waiver. And all this analysis would be both hurried and wasteful, since the defendant's appellate attorney would not be limited to the issues a defendant (or even his trial counsel) identified as possible avenues for appeal. *See Barnes*, 463 U.S. at 751.

Nor could attorneys stop at the issues the client raised. Under the Solicitor General's rule, attorneys would be required to conduct their own independent analyses of the record and the plea agreement to determine whether there were any "nonfrivolous" issues the defendant *could* raise on appeal but failed to identify. U.S. Br. 22. The attorney's role at this brief, critical stage of the proceeding would thus be transformed from a largely "ministerial" one to a frenzy of analysis and consultation, all while the appeal clock ticks down. *Flores-Ortega*, 528 U.S. at 477.

Postconviction courts adjudicating claims of ineffective assistance would also face a more difficult task. Instead of answering a binary question—"did the client instruct her attorney to appeal?"—they would need to reconstruct the exact words the defendant

used; construe the waiver to decide whether the defendant's request was fairly included in its scope; and (under the Solicitor General's rule) determine whether there were any nonwaived issues the defendant *could* have raised. This already complicated analysis would be made even more difficult by the fact that the overwhelming majority of defendants lack the assistance of counsel in postconviction proceedings. Pet'r Br. 29.

All of this would mean more, not less, work for courts and governments. Government attorneys would be required to brief the merits of the defendant's claims in a wasteful collateral proceeding. And if the postconviction court granted relief and the defendant's appeal were reinstated, the appellate court would need to duplicate the postconviction court's merits analysis on direct review.

2. In contrast to the substantial costs of the other side's rules, a rule asking whether the defendant "instructed his counsel to file an appeal," *Flores-Ortega*, 528 U.S. at 486, would be—and in practice has been—easy to administer. A defendant simply needs to tell his attorney whether he wishes to appeal. The attorney is required to follow that instruction, after appropriate consultation. And, if the lawyer allegedly fails to do so, the postconviction court may resolve a claim of ineffective assistance by making a single factual determination: whether the defendant actually instructed his attorney to appeal.

The Solicitor General complains that this rule will result in frequent disputes between defendants and attorneys as to whether the defendant instructed his attorney to appeal. U.S. Br. 30. There is no evidence that has actually occurred in the 19 years following

Flores-Ortega; in fact, the substantial majority of courts that have adopted Mr. Garza's rule have had little difficulty screening non-credible claims on the papers. Pet'r Br. 39-40 & n.13. Furthermore, the risk of such disputes is considerably *greater* under the Solicitor General's rule, given that it would hinge on the precise words the defendant used, making factual disagreements more likely and "evidentiary hearing[s]" more necessary. U.S. Br. 30.

The Solicitor General also asserts that Mr. Garza's rule is likely to result in an increase in frivolous appeals. U.S. Br. 28. There is no evidence that has occurred, either. That is unsurprising. Defendants who raise issues barred by an appeal waiver risk exposing themselves to a "harsher punishment" if they are found to have breached their plea agreements. U.S. Br. 20. Defendants—particularly those advised as to the effects of their waivers—are unlikely to indiscriminately run that risk. The Solicitor General claims that defendants may insist upon appealing issues barred by their waivers simply to get a free trip out of prison. U.S. Br. 30-31. That remarkable suggestion is belied by the government's own recognition that appealing waived issues is not "free," but poses a serious risk to the defendant's liberty; one free trip out of prison could result in a far longer stint in prison.

Indeed, until its merits brief in this case, the United States took the position that the majority approach was both workable and correct. Following a stipulated remand from this Court in *Nunez* v. *United States*, 554 U.S. 911 (2008), the United States filed a statement in June 2008 explaining it "does not necessarily have an interest in advocating a holding

that would encourage defense counsel" to forgo filing notices of appeal following an appeal waiver, "rather than follow[ing] the simple rule of filing a notice of appeal on demand." Cir. R. 54 Statement of the United States 9, 546 F.3d 450 (7th Cir. 2008) (No. 06-1014). Although the government had previously taken the opposite position, it explained that, "upon further reflection," that position was "not viable" and "would be inconsistent with the presumed prejudice required by *Flores-Ortega*." *Id.* at 9-10. Multiple filings, from that Administration and the one that followed, adhered to the same position.[5] The United States identifies nothing that has occurred since then to suggest that the approach it advocated has proven unworkable or that the contrary view has grown more "viable."

III. Even Under The Other Side's Rules, Mr. Garza Is Entitled To Have His Appeal Reinstated.

Regardless of which rule this Court adopts, the decision below should be reversed. There is no dispute Mr. Garza "instructed his attorney to appeal," and that his attorney disregarded that instruction. Pet. App. 2a; *see id.* at 17a, 29a. That is suffi-

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[5] *E.g.*, *Watson* v. *United States*, 493 F.3d 960, 963 (8th Cir. 2007) (recognizing the United States' concession to the same effect); U.S. Br. 9 n.2, *Gomez-Diaz* v. *United States*, 433 F.3d 788 (11th Cir. 2005) (04-11105), 2004 WL 4986113, at *9 n.2 (conceding it is "unnecessary to engage in a prejudice analysis" where a defendant has given "express instructions" to appeal, irrespective of appeal waiver); Gov't's Resp. to Mot. to Vacate 4, *United States* v. *Falcon*, 2011 WL 777852 (D.R.I. Feb. 28, 2011) (No. 07-147-ML), ECF No. 43 (similar).

cient under *Flores-Ortega* to warrant a presumption of prejudice.

The same result obtains under the Solicitor General's rule. It is undisputed Mr. Garza "continuously" asked his counsel to appeal "via phone calls and letters." Resp. Br. 2. And, just weeks after his counsel failed to appeal, Mr. Garza executed a sworn affidavit stating that among the issues he wished to challenge was an "involuntary plea." CR 5-6, 10. Throughout the district court proceedings, he insisted that he "understood little," that there was a "lack of discussion regarding the waiver," and that his counsel "ignored" him. CR 162. Mr. Garza checked "no" when asked whether he believed he was waiving his appellate rights, was never advised about the waiver by the court, and was advised multiple times that he could appeal. *See* Pet'r Br. 32. These facts easily show "a reasonable probability that he would have pressed an issue that could be heard notwithstanding his waiver." U.S. Br. 9.

Mr. Garza would also prevail under the State's rule. The lower courts found that Mr. Garza instructed his attorney to appeal without suggesting that he in any way limited his request to issues within the scope of his waiver. Pet. App. 2a, 17a, 29a. The State, citing trial counsel's affidavit, claims that Mr. Garza specifically asked to "appeal his sentence(s)." Resp. Br. 22. The State never previously made this claim; in its Brief in Opposition, it stated simply that Mr. Garza "requested his trial counsel to file a notice of appeal" without qualification. BIO 2; *see also* S. Ct. R. 14. The State's late-breaking suggestion to the contrary is, at best, a disputed claim of fact that cannot properly be accept-

ed on a motion for summary judgment. *Ferrier* v. *State*, 25 P.3d 110, 112 (Idaho 2001). In any event, a request to appeal a "sentence" would comfortably include claims preserved by the waiver, including a challenge to Mr. Garza's sentence on the ground that it was imposed pursuant to an involuntary plea. *See also supra* p. 15 n.4 (noting that sentencing challenges may survive a general waiver). Even under the State's restrictive rule, then, the proper result is the same: Mr. Garza should be given his appeal.

CONCLUSION

For the foregoing reasons, and those in the opening brief, the judgment of the Supreme Court of Idaho should be reversed.

Respectfully submitted,

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No. 17-1026

In the Supreme Court of the United States

GILBERTO GARZA, JR., PETITIONER

v.

STATE OF IDAHO

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a defendant who asks his attorney to file a direct appeal, despite having waived appellate rights in a plea agreement, may automatically obtain collateral relief, without any showing as to the issues he would have raised on appeal, if his attorney fails to perfect the appeal.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 7
Argument:
A defendant who has waived appellate rights is not prejudiced by his attorney's failure to file an appeal unless he can show that it deprived him of substantive appellate review 10
A. An ineffective-assistance claim requires that any inadequacies in the judicial process be traceable to counsel's errors 11
B. A defendant who has chosen to waive appellate rights may not automatically attribute the absence of substantive appellate review to counsel's errors 14
1. A knowing and intelligent appeal waiver validly renounces rights to substantive appellate review 14
2. A defendant who has signed an appeal waiver is not prejudiced unless his attorney deprived him of a right to appellate review that he did not renounce 18
C. Petitioner's per se prejudice rule is unsound and would produce undesirable results 22
D. The lower courts correctly denied relief because petitioner failed to show that he sought to appeal any claim that he did not waive 31
Conclusion 32

TABLE OF AUTHORITIES

Cases:

Anders v. *California*, 386 U.S. 738 (1967) 26
Bell v. *Cone*, 535 U.S. 685 (2002) 12

Cases—Continued: Page

Berrio-Callejas v. *United States*, 129 F.3d 1252, 1997 WL 704419 (1st Cir. 1997) 30
Blackledge v. *Allison*, 431 U.S. 63 (1977) 31
Bordenkircher v. *Hayes*, 434 U.S. 357 (1978) 16
Brady v. *United States*, 397 U.S. 742 (1970) 16
Campusano v. *United States*, 442 F.3d 770 (2d Cir. 2006) 28
Chambers v. *Maroney*, 399 U.S. 42 (1970) 12
Class v. *United States*, 138 S. Ct. 798 (2018) 20
Coleman v. *Thompson*, 501 U.S. 722 (1991) 24
Evitts v. *Lucey*, 469 U.S. 387 (1985) 19
Florida v. *Nixon*, 543 U.S. 175 (2004) 12
Jones v. *Barnes*, 463 U.S. 745 (1983) 15
Lee v. *United States*, 137 S. Ct. 1958 (2017) 11, 16
Martin v. *United States*, Nos. 07-cr-17, 10-cv-461, 2012 WL 2061934 (D. Me. June 7, 2012) 30
Massaro v. *United States*, 538 U.S. 500 (2003) 24
McCoy v. *Louisiana*, 138 S. Ct. 1500 (2018) 25
Nunez v. *United States*, 546 F.3d 450 (7th Cir. 2008) 6, 26, 29, 30
Ricketts v. *Adamson*, 483 U.S. 1 (1987) 15, 18
Rodriguez v. *United States*, 741 F. Supp. 2d 344 (D. Mass. 2010) 30
Roe v. *Flores-Ortega*, 528 U.S. 470 (2000) ..... *passim*
Smith v. *Robbins*, 528 U.S. 259 (2000) 26
State v. *Cope*, 129 P.3d 1241 (Idaho 2006) 15
Strickland v. *Washington*, 466 U.S. 668 (1984) 4, 7, 10, 12, 19, 23
Town of Newton v. *Rumery*, 480 U.S. 386 (1987) 15
Underwood v. *United States*, Nos. 14-cr-89, 15-cv-228, 2016 WL 554835 (E.D. Tenn. Feb. 10, 2016) 30

Cases—Continued: Page

United States v. *Andis*, 333 F.3d 886 (8th Cir.), cert. denied, 540 U.S. 997 (2003) 15
United States v. *Andrade-Martinez*, 536 Fed. Appx. 385 (4th Cir. 2013) 29
United States v. *Bascomb*, 451 F.3d 1292 (11th Cir. 2006) 15
United States v. *Beals*, 698 F.3d 248 (6th Cir. 2012) 15
United States v. *Bond*, 414 F.3d 542 (5th Cir. 2005) 17
United States v. *Broce*, 488 U.S. 563 (1989) 20
United States v. *Cardenas*, 405 F.3d 1046 (9th Cir. 152005) 15
United States v. *Chandler*, 534 F.3d 45 (1st Cir. 2008) 17
United States v. *Chapa*, 602 F.3d 865 (7th Cir. 2010) 17
United States v. *Cohen*, 459 F.3d 490 (4th Cir. 2006), cert. denied, 549 U.S. 1182 (2007) 17
United States v. *Cronic*, 466 U.S. 648 (1984) 10, 12, 23
United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006) 11, 12, 19, 22
United States v. *Guillen*, 561 F.3d 527 (D.C. Cir. 2009) 16, 18
United States v. *Hahn*, 359 F.3d 1315 (10th Cir. 2004) 15
United States v. *Johnson*, 541 F.3d 1064 (11th Cir. 2008), cert. denied, 557 U.S. 906 (2009) 17
United States v. *Khattak*, 273 F.3d 557 (3d Cir. 2001) 17
United States v. *Leyva-Matos*, 618 F.3d 1213 (10th Cir. 2010) 17
United States v. *Lockwood*, 416 F.3d 604 (7th Cir. 2005) 15
United States v. *Lopez-Armenta*, 400 F.3d 1173 (9th Cir.), cert. denied, 546 U.S. 891 (2005) 17

Cases—Continued: Page

United States v. *Manning*, 755 F.3d 455 (7th Cir. 2014) 29
United States v. *Marin*, 961 F.2d 493 (4th Cir. 1992) 15
United States v. *Mezzanatto*, 513 U.S. 196 (1995) 15
United States v. *Monahan*, 405 Fed. Appx. 742 (4th Cir. 2010), cert. denied, 563 U.S. 1001 (2011) 29
United States v. *Poindexter*, 492 F.3d 263 (4th Cir. 2007) 28
United States v. *Rene*, 577 Fed. Appx. 316 (5th Cir. 2014 15
United States v. *Richardson*, 558 F.3d 680 (7th Cir. 2009) 18
United States v. *Riggi*, 649 F.3d 143 (2d Cir. 2011) 15
United States v. *Rodriguez*, 416 F.3d 123 (2d Cir. 2005), cert. denied, 546 U.S. 1140 (2006) 17
United States v. *Rutan*, 956 F.2d 827 (8th Cir. 1992) 16, 17
United States v. *Sharp*, 442 F.3d 946 (6th Cir. 2006) 17
United States v. *Teeter*, 257 F.3d 14 (1st Cir. 2001) 15
United States v. *Washington*, 515 F.3d 861 (8th Cir.), cert. denied, 553 U.S. 1061 (2008) 17
United States v. *Wilson*, 429 F.3d 455 (3d Cir. 2005) 15
United States v. *Whitlow*, 287 F.3d 638 (7th Cir. 2002) 20
Weaver v. *Massachusetts*, 137 S. Ct. 1899 (2017) 11
Williams v. *Taylor*, 529 U.S. 362 (2000) 12, 24

Constitution, statutes, and rules:

U.S. Const. Amend. VI 7, 11, 22
18 U.S.C. 922(g)(1) 2
18 U.S.C. 3742(a) 15
28 U.S.C. 1291 15

Statutes and rules—Continued: Page

42 U.S.C. 1983 15
Idaho Code Ann. (2016):
§ 18-901(a) 1
§ 18-905(a) 1
§ 19-2514 (2017) 2
§ 37-2732(a) 1
Fed. R. Crim. P.:
Rule 11 16
Rule 11(a)(2) 22
Rule 11(b)(1) 16
Rule 11(b)(1)(N) 16
Rule 11(b)(2) 16
Rule 11(b)(3) 16
Idaho App. R. 14(a) 3
Idaho Crim. R.:
Rule 11(f) 16
Rule 11(f)(1) 2
Rule 11(f)(1)(C) 2
Rule 11(f)(3) 2
Rule 35 2

Miscellaneous:

Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209 (2005) 17

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

This case raises the question whether a criminal defendant who waives appellate rights in his plea agreement may obtain collateral relief based on his attorney's failure to perfect an appeal, without showing that he was deprived of any substantive appellate review. Because collateral attacks on federal and state criminal judgments are generally adjudicated under similar standards, the United States has a substantial interest in the outcome of this case.

STATEMENT

Following no-contest and guilty pleas in the District Court of the Fourth Judicial District of the State of Idaho, petitioner was convicted on one count of aggravated assault, in violation of Idaho Code Ann. §§ 18-901(a) and 18-905(a) (2016), and one count of possessing with intent to distribute a controlled substance (methamphetamine), in violation of Idaho Code Ann. § 37-2732(a) (2016). Pet.

App. 28a. He was sentenced to a total of ten years of imprisonment. *Id.* at 2a. He subsequently sought collateral relief, which the state district court denied. *Id.* at 28a-39a. The Court of Appeals of Idaho (*id.* at 16a-27a) and the Supreme Court of Idaho (*id.* at 1a-15a) affirmed.

1. In 2015, petitioner pleaded no contest to a state charge of aggravated assault, and guilty to a state charge of possession with intent to possess methamphetamine, pursuant to two separate plea agreements. Pet. App. 2a; see *id.* at 46a. In each plea agreement, petitioner "waived his right to appeal." *Id.* at 3a.

The plea agreements were "part of a global agreement that included a third case and other unfiled charges." Pet. App. 2a n.1. The State agreed not to file additional burglary and grand theft charges and not to refer petitioner for federal prosecution on a charge of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 29a, 41a, 47a. The State further agreed not to seek "Persistent Violator" sentencing enhancements, which would have exposed petitioner to potential life sentences. *Id.* at 41a-47a; see Idaho Code Ann. § 19-2514 (2017). The parties instead agreed to specific sentences totaling ten years of imprisonment, which would be binding on the district court if it accepted the plea agreements. Pet. App. 41a, 47a; see Idaho Crim. R. 11(f)(1)(C) and (3).

Consistent with an Idaho law authorizing a plea agreement to "include a waiver of the defendant's right to appeal the judgment and sentence of the court," Idaho Crim. R. 11(f)(1), petitioner's agreements stated that he "waive[d] his right to appeal and waive[d] his right" to file a motion for correction or reduction of his sentence under Idaho Crim. R. 35. Pet. App. 44a, 49a.

Petitioner signed both agreements and initialed the appeal-waiver provisions. *Id.* at 29a.

The trial court "accepted the plea agreements and imposed sentence[s] in accordance with them." Pet. App. 2a. The court expressly observed during the plea hearing that petitioner had waived his "appeal rights with respect to the sentences imposed." Idaho Sup. Ct. Clerk's Record on Appeal (CR) 132. But the court "advised [petitioner] of his appeal rights anyway." Pet. App. 3a; see CR 132.

No notice of appeal was filed within the 42 days allowed by state law. Pet. App. 3a; see Idaho App. R. 14(a).

2. Approximately four months after sentencing, petitioner collaterally attacked the judgment. Pet. App. 3a. Petitioner claimed, among other things, that his pleas had been involuntary and that his counsel had been constitutionally ineffective for not filing an appeal. *Id.* at 3a, 29a. After appointing postconviction counsel and providing notice, the state district court dismissed all of petitioner's claims except for the ineffectiveness claim, on which it reserved ruling. *Ibid.* It found, in particular, a "lack of supporting evidence" for petitioner's claim that his pleas had been involuntary. *Id.* at 29a.

As to the ineffectiveness claim, petitioner stated in affidavits "that he asked his attorney to appeal" and "that his attorney failed to appeal despite numerous phone calls and letters." Pet. App. 3a. Petitioner's former counsel stated in an affidavit that petitioner had asked him to appeal "the sentence(s) of the court," *id.* at 52a, but that "he did not file an appeal because [petitioner] 'received the sentence(s) he bargained for in his

[plea] agreement' and 'an appeal was problematic because [petitioner] waived his right to appeal in his [plea] agreements,'" *id.* at 3a; see *id.* at 52a.

The parties moved for summary adjudication of the ineffectiveness claim, with petitioner seeking "a reopening of the appeals period in the underlying criminal cases on the basis of ineffective assistance of counsel." Pet. App. 3a. The state district court directed petitioner to identify any issues he wished to pursue on appeal that were "non-frivolous and not subject to dismissal as a result of his appeal waivers." *Id.* at 32a. In response, petitioner filed a supplemental brief identifying "only one issue he wishe[d] to pursue on appeal in the underlying cases: whether the [trial court] properly exercised its discretion in imposing the sentences to which he and the State agreed." *Id.* at 31a-32a.

The state district court subsequently rejected petitioner's claim of ineffective assistance of counsel. Pet. App. 28a-39a. The court observed that this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), requires a defendant claiming ineffectiveness to establish both that his counsel's performance was deficient and that the deficient performance had prejudiced him. Pet. App. 33a. The court accepted that, "[g]enerally speaking, trial counsel's failure to file an appeal at a criminal defendant's request * * * prejudices the defendant, irrespective of whether the appeal has merit." *Id.* at 33a-34a. And the court recognized that, under *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), "a presumption of prejudice" attaches to a "denial of [an] entire judicial proceeding" itself, such as an appeal, "which a defendant wanted at the time and to which he had a right." Pet. App. 34a (quoting *Flores-Ortega*, 528 U.S. at 483). The court observed, however, that *Flores-Ortega* did

not "involve[] a defendant who had waived the right to appeal, as [petitioner] did." *Ibid.*

"When a defendant has waived the right to appeal in an enforceable plea agreement," the state district court observed, the defendant "lacks the right to appeal," and his appeal will accordingly face "dismissal" rather than "consideration on the merits." Pet. App. 36a-37a. The court therefore reasoned that a defendant who has waived his appeal rights "does not, in fact, lose his 'right' to an 'entire judicial proceeding' at the appellate level," but instead "loses" only "the opportunity to see his appeal dismissed without a decision on the merits." *Id.* at 37a (quoting *Flores-Ortega*, 528 U.S. at 483). The court determined that such a defendant does not "deserve[] the benefit of a counterfactual presumption that he is prejudiced by his trial counsel's failure to attempt to exercise a waived right," but "should, instead, be required to *show* prejudice." *Ibid.*

The state district court explained that a defendant could satisfy that burden by establishing "non-frivolous grounds for asking the appellate court to decide his appeal on the merits, despite the appeal waiver." Pet. App. 38a. For instance, "if the defendant shows that there are non-frivolous grounds for contending on appeal either that (i) the appeal waiver is invalid or unenforceable, or (ii) the issues he wants to pursue on appeal are outside the waiver's scope, he shows he was prejudiced by his trial counsel's failure to file appeals at his request." *Ibid.* The court found, however, that petitioner had not made the requisite showing, because his appeal waivers were valid and enforceable; he had agreed to the waivers knowingly and voluntarily; and he had not even "argued, much less shown," that the claims

he sought to raise on appeal fell "outside the scope" of the waivers. *Ibid.*

3. The state court of appeals affirmed. Pet. App. 16a-27a. The court agreed that "prejudice is not presumed when the defendant waives the right to appeal and the attorney fails to file an appeal upon the defendant's request." *Id.* at 24a. And it found that petitioner had "made no * * * showing" that he was prejudiced by the absence of an appeal following his waiver. *Id.* at 27a.

4. The state supreme court granted review and affirmed. Pet. App. 1a-15a. Like the lower courts, it "decline[d] to presume counsel ineffective for failing to appeal at [petitioner's] request when [petitioner] ha[d] waived the right to appeal as part of a plea agreement." *Id.* at 10a. And the court found that petitioner, who had not identified "any non-frivolous grounds for appeal," had not shown that he was prejudiced by his counsel's performance. *Id.* at 15a.

The state supreme court explained that granting relief automatically makes sense only where the defendant has lost "a right" to an appellate proceeding. Pet. App. 10a-11a (quoting *Flores-Ortega*, 528 U.S. at 483) (emphasis omitted). The court observed that "'an appeal in the teeth of a valid waiver is frivolous,'" and that a defense attorney has a duty both "not [to] file frivolous litigation" and "to avoid taking actions that will cost [his or her] client the benefit of the plea bargain." *Id.* at 13a-14a (quoting *Nunez* v. *United States*, 546 F.3d 450, 455 (7th Cir. 2008)). The court emphasized the importance of honoring appeal waivers, which are part of "a bilateral contract, to which both the State and defendant are bound" and which provide defendants a means of obtaining significant "'concessions'" from the State. *Id.* at 14a (citation omitted). "When [petitioner's] attorney declined

to file an appeal," the court noted, "counsel ensured [petitioner] would not be in breach of the plea." *Ibid.*

SUMMARY OF ARGUMENT

Counsel's failure to file a requested appeal prejudices a criminal defendant only if it "actually cause[s]" the defendant to "forfeit a judicial proceeding to which he was otherwise entitled." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 484, 485 (2000). When a defendant has voluntarily renounced rights to appellate review through an explicit waiver, the absence of such review cannot automatically be blamed on attorney error. Rather, the defendant must show that counsel's failure to appeal—not his own waiver—is what "actually" denied him merits review. Granting collateral relief for defendants, like petitioner, who have not made such a showing would be legally anomalous and promote frivolous appeals.

A. A defendant's Sixth Amendment right to the effective assistance of counsel is not violated unless he is prejudiced by counsel's errors. Accordingly, this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), typically requires a defendant alleging a violation of that right to plead and prove case-specific prejudice from his attorney's constitutionally inadequate performance. This Court explained in *Roe* v. *Flores-Ortega*, *supra*, that one of the few circumstances in which prejudice may be presumed is when an attorney's deficiency "deprived" the defendant of an "entire judicial proceeding," such as an appeal, which the defendant wanted "and to which he had a right." 528 U.S. at 483. But the Court also emphasized "the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal," *id.* at 484, requiring proof of such causation as a prerequisite for triggering the presumption, see *id.* at 484-486.

B. A defendant who has knowingly and voluntarily waived appellate rights must prove—not presume—that attorney error, rather than his own waiver, was responsible for the absence of substantive appellate review. An attempt to appeal an issue covered by an appeal waiver would be dismissed by the appellate court without reaching the merits. Therefore, when counsel fails to file an appeal requested by the defendant, it cannot be presumed that the lack of appellate review was due to counsel's inaction. Instead, the defendant's *own* choice to renounce his appellate rights, in return for concessions from the prosecution, may be the true cause.

To show that counsel's failure to appeal in fact caused him prejudice, the defendant must show a reasonable probability that, "but for" counsel's error, he would have appealed a claim that the court of appeals would have considered on the merits. *Flores-Ortega*, 528 U.S. at 484. He can make that showing directly, as by pointing to evidence that he expressed interest in appealing a non-waived issue; or indirectly, as by identifying nonfrivolous grounds for appealing despite the waiver. Either showing would establish that counsel's failure to appeal actually deprived the defendant of further merits review. But a generalized request to file a notice of appeal notwithstanding an appeal waiver, with no reasonably probable connection to any retained right to appellate review, would not suffice.

C. Petitioner argues that a per se rule of prejudice is necessary because, even where a defendant has generally waived his right to appellate review, he could potentially bring some claims outside the waiver's scope, such as a challenge to the validity or enforceability of the waiver itself. But the possibility that some defendants might have raised non-waived claims supports a case-

specific inquiry, not a rule of automatic prejudice—especially since valid appeal waivers are much more common than invalid ones. Nor can petitioner's proposed rule be justified by a defendant's interest in autonomy. To the extent such an interest could support a presumption of prejudice under *Strickland*, the defendant *already* exercised his autonomy by deciding to sign the appeal waiver.

Requiring a defendant to make the traditional showing of *Strickland* prejudice, by establishing a reasonable probability that he would have pressed an issue that could be heard notwithstanding his waiver, is neither unfair nor complex. The defendant will not have to show that he would have *prevailed* on such a claim, only that he would have raised it. A defendant who signed an appeal waiver, and thus necessarily considered the scope of his appellate rights, is well-positioned to make such a showing, which is similar in kind to the prejudice showing required in related *Strickland* contexts. By dispensing with that requirement, petitioner's rule would require the automatic reinstatement even of waived, frivolous appeals—the very filing of which would breach the plea agreement and risk undoing the benefits the defendant received thereunder. At a minimum, petitioner's rule will incentivize costly and burdensome evidentiary hearings, all for the sake of appeals that would have gone—and, if reinstated, would go—nowhere.

D. In this case, petitioner has not shown a reasonable probability that counsel's failure to appeal deprived him of substantive appellate review. Following his conviction and sentencing, petitioner asked trial counsel to "appeal," Pet. App. 42a, without specifying any particular issue he wished to raise. Petitioner has, by now,

abandoned any claim that his guilty pleas were involuntary. And when asked by the court on collateral review what claim he would bring if allowed to file an out-of-time appeal, he identified only one issue, which was squarely foreclosed by his waiver. Under those circumstances, petitioner is not entitled to reopen his criminal case.

ARGUMENT

A DEFENDANT WHO HAS WAIVED APPELLATE RIGHTS IS NOT PREJUDICED BY HIS ATTORNEY'S FAILURE TO FILE AN APPEAL UNLESS HE CAN SHOW THAT IT DEPRIVED HIM OF SUBSTANTIVE APPELLATE REVIEW

The "'right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial,' * * * or a fair appeal." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *United States* v. *Cronic*, 466 U.S. 648, 658 (1984)). Relief on a claim of ineffective assistance accordingly requires not only constitutionally deficient performance, but also "a breakdown in the adversary process that renders the result unreliable" and thus prejudices the defendant. *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). A defendant cannot show, and is not entitled to presume, such a "breakdown in the adversary process" simply because no appeal was filed after he expressly agreed to waive appellate rights. Instead, a defendant must establish that the absence of substantive appellate review is attributable to his counsel's constitutional inadequacy, rather than to his own knowing and voluntary appeal waiver. Petitioner, who has not identified any retained appellate rights that he sought to invoke, has failed to make the requisite showing. And no sound reason exists to adopt a rule of per se prejudice that promotes the breaching of plea agreements through the filing of frivolous appeals.

A. An Ineffective-Assistance Claim Requires That Any Inadequacies In The Judicial Process Be Traceable To Counsel's Errors

1. The Sixth Amendment does not guard against all attorney errors. This Court has emphasized that the "right to effective representation" is a right to "*effective* (not mistake-free) representation." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). Thus, even where an attorney has rendered constitutionally deficient performance—*i.e.*, performance that falls "outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690—"a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced," *Gonzalez-Lopez*, 548 U.S. at 147. "Counsel," the Court has explained, "cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have)." *Ibid.*

In assessing prejudice, this Court "normally appl[ies] a strong presumption of reliability to judicial proceedings and require[s] a defendant to overcome that presumption by showing how specific errors of counsel undermined the reliability of the finding of guilt." *Flores-Ortega*, 528 U.S. at 482 (citations and internal quotation marks omitted). Thus, "in most cases," a defendant claiming ineffective assistance of counsel bears the burden to affirmatively prove from the record that counsel's mistakes prejudiced him. *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1910 (2017). In evaluating whether the defendant has carried that burden, the Court has generally avoided "categorical rules," which are "ill suited to an inquiry that * * * demands a 'case-by-case examination' of the 'totality of the evidence.'" *Lee* v. *United*

States, 137 S. Ct. 1958, 1966 (2017) (quoting *Williams* v. *Taylor*, 529 U.S. 362, 391 (2000)).

2. Although prejudice to the defendant is an invariable component of an ineffective-assistance claim, *Gonzalez-Lopez*, 548 U.S. at 147, the Court has identified a "very short list of errors for which prejudice is presumed," *Weaver*, 137 S. Ct. at 1916 (Alito, J., concurring in the judgment). The Court has cautioned, however, that a presumption of prejudice will be justified only "infrequently," *Florida* v. *Nixon*, 543 U.S. 175, 190 (2004), and it has repeatedly resisted attempts to create new categories of presumptively prejudicial errors. See, *e.g.*, *id.* at 190-191 (rejecting presumption of prejudice where counsel conceded defendant's guilt during capital case); *Bell* v. *Cone*, 535 U.S. 685, 697 (2002) (rejecting presumption of prejudice where counsel "fail[ed] to adduce mitigating evidence" and "waive[d]" closing argument in a capital case); *Cronic*, 466 U.S. at 666 (rejecting presumption of prejudice where counsel was inexperienced and unprepared); *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970) (rejecting claim of "per se" prejudice where counsel was not appointed until very shortly before trial).

The Court's pathmarking decision in *Strickland* v. *Washington*, *supra*, identified three limited circumstances in which prejudice may be presumed: an "[a]ctual or constructive denial of the assistance of counsel altogether"; where the "state interfere[s] with counsel's assistance"; and where "counsel is burdened by an actual conflict of interest." 466 U.S. at 692. The Court has explained that those types of errors "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," *Cronic*, 466 U.S. at 658; see *Strickland*, 466 U.S. at 692 ("Prejudice in

these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.").

The Court has also recognized that a presumption of prejudice is warranted in an "unusual" circumstance where "counsel's deficient performance" causes "the forfeiture of a proceeding" to which the defendant "had a right." *Flores-Ortega*, 528 U.S. at 483. In *Roe* v. *Flores-Ortega*, *supra*, a defendant pleaded guilty but did not expressly waive his appeal rights, and his counsel did not file a notice of appeal. See *id.* at 473-474. The Court explained that a defendant in that circumstance can show ineffective assistance by proving either (1) that his attorney disregarded his express instruction to file an appeal or (2) that his attorney deficiently failed to consult with him about a potential appeal that he is reasonably likely to have taken. See *id.* at 478-486. The Court reasoned, in part, that because a proceeding that "never took place" necessarily lacks "reliability," a defendant who has proved that "counsel's deficient performance * * * deprived [him] of [an] appellate proceeding altogether" has ipso facto shown that counsel's errors prejudiced him. *Id.* at 483 (citation and internal quotation marks omitted). "[D]enial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right," the Court concluded, "demands a presumption of prejudice." *Ibid.*

Even in cases in which the loss of a proceeding is alleged, however, the Court has not dispensed with the requirement that a defendant prove that the loss was specifically attributable to his attorney. In *Flores-Ortega* itself, for example, the Court required the defendant to establish a "reasonable probability" that, but for his attorney's allegedly deficient failure to consult with him

about an appeal, the defendant would in fact have exercised his appellate rights. 528 U.S. at 484; see *id.* at 485-486. The Court emphasized that it was "break[ing] no new ground" by requiring proof that counsel's errors actually "caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled." *Id.* at 485.

B. A Defendant Who Has Chosen To Waive Appellate Rights May Not Automatically Attribute The Absence Of Substantive Appellate Review To Counsel's Errors

A defendant whose right to a "judicial proceeding," *Flores-Ortega*, 528 U.S. at 485, has been qualified or limited by his own voluntary appeal waiver is not entitled to a presumption of prejudice when his counsel fails to file a notice of appeal. Such a "*per se* prejudice rule" would "ignore[] the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal," *id.* at 484. Instead, a defendant must show that the absence of substantive appellate review was the result of counsel's inaction, rather than the defendant's own knowing and intelligent waiver of rights to such review.

1. A knowing and intelligent appeal waiver validly renounces rights to substantive appellate review

Separate from any asserted error regarding counsel's failure to file an appeal, a defendant who signs an appeal waiver has himself renounced the right to have issues within the scope of the waiver heard on the merits by an appellate court.

a. Appeal waivers are a common, beneficial, and enforceable mechanism by which the prosecution and the defense ensure that a defendant's guilty plea puts to rest various issues as to which the defendant would otherwise have a right to appellate review.

Although a defendant has "no constitutional right to an appeal," *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983), federal and state systems grant appellate rights following a criminal conviction. See 18 U.S.C. 3742(a); 28 U.S.C. 1291; see, *e.g.*, *State* v. *Cope*, 129 P.3d 1241, 1245 (Idaho 2006). But rights to appellate review, like other procedural rights, are waivable. See, *e.g.*, *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.").

This Court has repeatedly recognized that a defendant may knowingly and voluntarily waive constitutional or statutory rights as part of a plea agreement. See, *e.g.*, *Ricketts* v. *Adamson*, 483 U.S. 1, 8-10 (1987) (upholding plea agreement's waiver of right to raise a double-jeopardy defense); *Town of Newton* v. *Rumery*, 480 U.S. 386, 389 (1987) (affirming enforcement of plea agreement's waiver of right to file an action under 42 U.S.C. 1983). Every federal court of appeals with criminal jurisdiction has thus recognized that an appeal waiver is generally enforceable, as long as it was entered into knowingly and voluntarily.[1]

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[1] See *United States* v. *Teeter*, 257 F.3d 14, 23 (1st Cir. 2001); *United States* v. *Riggi*, 649 F.3d 143, 146-147 (2d Cir. 2011); *United States* v. *Wilson*, 429 F.3d 455, 460-461 (3d Cir. 2005); *United States* v. *Marin*, 961 F.2d 493, 496 (4th Cir. 1992); *United States* v. *Rene*, 577 Fed. Appx. 316, 317 (5th Cir. 2014) (per curiam); *United States* v. *Beals*, 698 F.3d 248, 255-256 (6th Cir. 2012); *United States* v. *Lockwood*, 416 F.3d 604, 608 (7th Cir. 2005); *United States* v. *Andis*, 333 F.3d 886, 889-890 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); *United States* v. *Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005); *United States* v. *Hahn*, 359 F.3d 1315, 1324 (10th Cir. 2004) (en banc) (per curiam); *United States* v. *Bascomb*, 451 F.3d 1292,

An array of procedural protections ensures that any defendant who agrees to waive appellate rights in a plea agreement does so "knowingly, voluntarily, and intelligently." Pet. App. 5a. In the federal system, Federal Rule of Criminal Procedure 11 specifies the responsibilities of defense counsel, the prosecution, and the district court to ensure that any plea is knowing and voluntary. Under Rule 11, "[b]efore the court accepts a plea of guilty or nolo contendere," the court must ensure that the defendant fully understands the rights he is giving up, Fed. R. Crim. P. 11(b)(1); that he enters into the agreement of his own volition, Fed. R. Crim. P. 11(b)(2); and that "there is a factual basis for the plea," Fed. R. Crim. P. 11(b)(3). Where the plea agreement contains a waiver of appellate rights, the defendant must be specifically informed by the judge of "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed. R. Crim. P. 11(b)(1)(N); see Idaho Crim. R. 11(f) (analogous state procedure for plea agreements that "include a waiver of the defendant's right to appeal the judgment and sentence of the court").

Appeal waivers, like other fruits of plea negotiations, can help secure a "'mutuality of advantage' to defendants and prosecutors, each with his own reasons" for agreeing to forgo further review. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (quoting *Brady* v. *United States*, 397 U.S. 742, 752 (1970)). Prosecutors value appeal waivers as a means of "preserv[ing] the finality of judgments and sentences imposed pursuant to valid pleas of guilty." *United States* v. *Rutan*, 956 F.2d 827, 829 (8th Cir. 1992); see *Lee*, 137 S. Ct. at 1967 ("[T]he strong societal

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1294 (11th Cir. 2006); *United States* v. *Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009).

interest in finality has special force with respect to convictions based on guilty pleas.") (citation and internal quotation marks omitted). And defendants use appeal waivers "to gain concessions from the government." *Rutan*, 956 F.2d at 829. One survey of federal prosecutions found, for instance, that plea agreements containing appeal waivers "more frequently" included fixed sentences or sentencing ranges, downward departures, safety-valve credits, and factual stipulations—all of which defendants used to "limit[ ] their exposure to unexpected negative results at sentencing." Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212-213 (2005).

b. A defendant whose plea agreement includes an appeal waiver has knowingly and voluntarily forgone a general right to appellate merits review. He instead retains such a right only with respect to issues (if any) that fall outside the scope of the waiver.

All of the courts of appeals have recognized that, where an appeal is barred by the terms of a waiver that the government seeks to enforce, the appropriate course is to dismiss the appeal without reaching the merits.[2]

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[2] See *United States* v. *Chandler*, 534 F.3d 45, 51 (1st Cir. 2008); *United States* v. *Rodriguez*, 416 F.3d 123, 128-129 (2d Cir. 2005), cert. denied, 546 U.S. 1140 (2006); *United States* v. *Khattak*, 273 F.3d 557, 563 (3d Cir. 2001); *United States* v. *Cohen*, 459 F.3d 490, 492 (4th Cir. 2006), cert. denied, 549 U.S. 1182 (2007); *United States* v. *Bond*, 414 F.3d 542, 546 (5th Cir. 2005); *United States* v. *Sharp*, 442 F.3d 946, 952-953 (6th Cir. 2006); *United States* v. *Chapa*, 602 F.3d 865, 868-869 (7th Cir. 2010); *United States* v. *Washington*, 515 F.3d 861, 864 (8th Cir.), cert. denied, 553 U.S. 1061 (2008); *United States* v. *Lopez-Armenta*, 400 F.3d 1173, 1174 (9th Cir.), cert. denied, 546 U.S. 891 (2005); *United States* v. *Leyva-Matos*, 618 F.3d 1213, 1215 (10th Cir. 2010); *United States* v. *Johnson*,

Although a defendant who appeals despite a valid waiver might have his appeal docketed and his briefs read by the court prior to dismissal, he has no right to insist that he be *heard* by the appellate court on any issue that falls within the scope of the waiver. On those issues, the court's consideration is necessarily limited solely to the threshold question whether merits review is barred because the defendant has waived it.

Furthermore, a defendant who appeals despite a waiver may be found in breach of the plea agreement, allowing the prosecutor to withdraw any concessions that were negotiated as part of the agreement, such as the dismissal of other, potentially more serious charges. See, *e.g.*, *Ricketts*, 483 U.S. at 8-9. In the federal system, the government may also refuse to move for a cooperation-based reduction in sentence when the defendant fails to honor his own obligations. See, *e.g.*, *United States* v. *Richardson*, 558 F.3d 680, 682-683 (7th Cir. 2009).

2. A defendant who has signed an appeal waiver is not prejudiced unless his attorney deprived him of a right to appellate review that he did not renounce

Where a defendant has himself already waived rights to appellate merits review, his attorney's failure to file a notice of appeal is not invariably prejudicial. Rather, any error by the attorney in that regard affects the defendant only if it deprived him of a still-extant right to an appellate merits proceeding. In accord with the usual rule that a defendant bears the burden to show prejudice on an ineffective-assistance claim, a defendant who cannot plead and prove such deprivation should not be awarded collateral relief.

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541 F.3d 1064, 1069 (11th Cir. 2008), cert. denied, 557 U.S. 906 (2009); *Guillen*, 561 F.3d at 532 (D.C. Cir.).

a. A defendant who has no right to appellate review on the merits is not prejudiced by its absence. Such a defendant is not "harmed" in any practical or constitutional sense, *Gonzalez-Lopez*, 548 U.S. at 147, because he loses only the chance to have his appeal dismissed on the basis of his own knowing and intelligent waiver. Nor has there been "a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

Without any showing that an appeal would have gotten past the threshold stage, a defendant has not suffered the "denial of [an] *entire* judicial proceeding * * * *to which [he] has a right*," such that prejudice may reasonably be presumed, *Flores-Ortega*, 528 U.S. at 483 (emphasis added). A defendant's entitlement to a counseled appeal is based not on its symbolic value, but on its substantive role in the legal process. See pp. 10-11, *supra*; p. 25, *infra*. The Court has explained, for example, that the assistance of counsel on appeal is "necessary to present an appeal in a form suitable for consideration on the merits," *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985), rather than for any formalistic purpose. The Court's presumption of prejudice when an appeal is not taken—which it has analogized to the presumption of prejudice when an appeal is taken but no appellate counsel is provided—similarly rests on the premise that a defendant is entitled to a fair hearing on the merits. See *Flores-Ortega*, 528 U.S. at 483.

In terms of "the reliability of the process," *Flores-Ortega*, 528 U.S. at 482 (citation and ellipsis omitted), appeals that would be dismissed at the threshold are no different than "judicial proceedings that never took place," *id.* at 483. An appeal in which no merits consid-

eration would occur plays no meaningful role in the "adversary process" of adjudicating the substance of disputes between parties. *Ibid.* (citation omitted). No one would say, for example, that a defendant is prejudiced by his attorney's refusal to file an appeal in the wrong court—*e.g.*, in the federal rather than state court of appeals. Nor would anyone say that a defendant is prejudiced if his attorney declines to notice a requested appeal from a clearly non-appealable order, such as a pretrial order denying a suppression motion. A defendant who would file an appeal barred by his own waiver likewise suffers no harm from his attorney's refusal to do so.

Indeed, a defendant may in fact *benefit* from his attorney's inaction. In light of the consequences of breaching a plea agreement, a defendant who files such an appeal could face an appreciably harsher punishment. See *United States* v. *Whitlow*, 287 F.3d 638, 640-641 (7th Cir. 2002) ("[A] defendant's appeal, in disregard of a promise not to do so, exposes him to steps that can increase the sentence.").[3]

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[3] Petitioner notes (Br. 21) that, even without an appeal waiver, a guilty plea inherently "reduces the scope of potentially appealable issues," *Flores-Ortega*, 528 U.S. at 480. See, *e.g.*, *Class* v. *United States*, 138 S. Ct. 798, 805-806 (2018). But when a plea does not include an appeal waiver, it does not waive a defendant's "right" to an appeal. The inherent preclusive effect of a guilty plea is based not on any "conscious waiver," but instead on "the admissions necessarily made upon entry of a voluntary plea." *United States* v. *Broce*, 488 U.S. 563, 573-574 (1989). Although often treated as the functional equivalent of (and described as) a "waiver," the inherent preclusive effect of a guilty plea is more precisely described as barring appellate relief for claims that are not "consistent" with a valid admission of guilt and as "render[ing] irrelevant" the merits of claims that do not call the validity of the plea into question, *Class*, 138 S. Ct.

b. Because the absence of an appeal can be prejudicial only when a defendant has lost out on appellate merits review, a defendant who signed an appeal waiver cannot show ineffective assistance unless he demonstrates that he was denied such review. In particular, he must plead and prove that an appeal would not have been barred by his waiver—*i.e.*, that it would have been a "judicial proceeding * * * to which he had a right," *Flores-Ortega*, 528 U.S. at 483. Only by doing so can he establish that his attorney's deficiencies, rather than his own renouncement of appellate rights, "deprived [him] of the appellate proceeding," *ibid.*

As in other circumstances in which a defendant alleges that counsel's errors were what "caused [him] to forfeit a judicial proceeding to which he was otherwise entitled," *Flores-Ortega*, 528 U.S. at 485, such a defendant must show a "reasonable probability" that the proceeding would have occurred in the absence of counsel's errors, *ibid.* In this particular context—where the hypothetical proceeding at issue is merits consideration of an appellate claim—the defendant must show a reasonable probability that, but for counsel's deficient performance, he would have raised claims that the appellate court would have considered on the merits. A defendant could potentially make such a showing through direct evidence that he in fact requested, or at least expressed

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at 805. It also necessarily leaves open the possibility that the defendant may appeal his sentence. An appeal waiver, in contrast, reflects a knowing and intelligent renunciation of a defendant's appellate rights; contemplates that the filing of an appeal may itself be a breach of contract with potentially severe consequences; and may thus properly be considered the root cause for the absence of appellate review in cases in which no appeal is taken.

interest in, an appeal on a non-waived issue. In the absence of such direct evidence, a defendant might point to "evidence that there were nonfrivolous grounds for appeal" despite the waiver, *Flores-Ortega*, 528 U.S. at 485, or to evidence that the waiver itself contemplated appellate consideration of certain issues—*e.g.*, through express reservation of such issues in a conditional plea, cf. Fed. R. Crim. P. 11(a)(2).

The requisite showing would thus mirror the showing required of any defendant whose ineffective-assistance claim rests on the denial of an appellate proceeding "to which he had a right," *Flores-Ortega*, 528 U.S. at 483. The Court made clear in *Flores-Ortega* that such a defendant must either show that he in fact sought the proceeding or a reasonable probability that counsel's errors caused him not to do so, *id.* at 483-486. In cases where, unlike in *Flores-Ortega*, a defendant has signed an appeal waiver, a generalized request that an attorney file an appeal—as opposed to an appeal request that is tied to a specific issue that the appellate court could consider—is not enough to show that appellate merits review would have followed. Instead, a defendant must show a "reasonable probability" that the appeal would have been one as to which he had a right to be heard. Without such a showing, an attorney's failure to file a notice of appeal has cost the defendant nothing, and he has accordingly suffered no denial of his Sixth Amendment right to the effective assistance of counsel, see *Gonzalez-Lopez*, 548 U.S. at 147.

C. Petitioner's Per Se Prejudice Rule Is Unsound And Would Produce Undesirable Results

Petitioner advocates a rule of per se prejudice that would attach no weight to a defendant's waiver of appellate rights, make no effort to discern whether an appeal

would have been heard on the merits, and automatically hold the attorney—rather than the defendant—responsible for forgoing substantive appellate review. But neither the "logic" (Br. 15) of *Flores-Ortega*, nor any other sound legal or practical considerations, support such a rule, which would result in of frivolous appeals.

1. Petitioner asserts (Br. 15-16) that an attorney's failure to file an appeal on behalf of a defendant who has waived appellate rights may cause the defendant to forfeit "the numerous claims that survive an appeal waiver—including the right to challenge the validity, scope, and enforceability of the waiver." He also points out (Br. 20) that "a defendant who signs an appeal waiver" may "waive[] the right to bring certain claims on appeal, but retain[] the right to bring others." And he notes (Br. 17-18, 36) that not all appeal waivers are identical in scope, that a defendant may litigate the scope of the waiver on appeal, and that some federal courts of appeals have recognized implicit exceptions to even broad appeal waivers.

The fact that *some* defendants might have raised non-waived claims, however, supports a case-specific inquiry—not petitioner's one-size-fits-all approach. This case does not present a circumstance in which prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692; see *Cronic*, 466 U.S. at 658 (countenancing presumption of prejudice in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified"). The case-specific inquiry described above precludes relief only where a defendant cannot demonstrate a reasonable probability that, in his particular case, an appeal would have been heard on the merits. Little reason exists to believe that

the inquiry will reach an incorrect or unjust result in a significant number of cases. See *Coleman* v. *Thompson*, 501 U.S. 722, 737 (1991) ("[T]he justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time.").

A defendant whose appeal waiver is quite narrow—leaving many issues open for appeal—may have little difficulty making the requisite showing. But a defendant like petitioner, whose appeal waiver is much broader and would admit of few exceptions, will face a more difficult hurdle. That is as it should be; few defendants who have broadly waived their appellate rights would in fact have a cognizable claim of an unenforceable waiver, breached plea agreement, miscarriage of justice, or deprivation of fundamental rights, see Pet. Br. 17-18. And many such claims will require further factual development, such that they would more appropriately be addressed on collateral review, rather than on direct appeal. Cf. *Massaro* v. *United States*, 538 U.S. 500, 505-506 (2003).

Variation in defendants' circumstances cannot justify a per se rule of prejudice that would countenance ineffective-assistance claims even by defendants—such as petitioner himself, see Part D, *infra*—who have broadly waived their appellate rights and cannot show that they would have raised any reviewable claim on appeal. A case-specific inquiry that requires such a showing as a prerequisite to relief is no more complicated, or likely to reach incorrect results, than the case-specific prejudice inquiries that this Court has required in other ineffective-assistance contexts. Any such inquiry "of necessity requires a case-by-case examination of the evidence," *Williams*, 529 U.S. at 391 (citation omitted),

which can include consideration of whether a defendant would have insisted on pressing particular legal arguments, see *Flores-Ortega*, 528 U.S. at 486 (recognizing that the strength of an argument is relevant to whether a defendant would have wanted to raise it on appeal).

As noted above, the appropriate case-specific inquiry in this circumstance mirrors the inquiry that is required whenever a defendant alleges that counsel's errors deprived him of a proceeding. The Court in *Flores-Ortega* itself rejected a "*per se* prejudice rule" that "ignore[d] the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." 528 U.S. at 484. It instead reasoned that "[i]f the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything and he is not entitled to relief." *Ibid.* Similar logic applies here, and the Court should make clear that a similar case-specific approach is required.

2. Petitioner separately contends that "a defendant whose attorney ignores an instruction to appeal" must be "afforded a presumption of prejudice," because that attorney has "usurped a 'decision' that 'rests with the defendant' alone." Pet. Br. 23 (quoting *Flores-Ortega*, 528 U.S. at 485) (brackets omitted). But petitioner's attempt to ground a rule of presumptive prejudice in a criminal defendant's "protected autonomy right," *id.* at 24 (citation omitted), is misplaced.

The Court has distinguished a defendant's right to autonomy from the right to effective assistance under *Strickland*, see *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1510-1511 (2018), and the presumption of prejudice in *Flores-Ortega* that petitioner seeks to extend was not premised on autonomy interests, see 528 U.S. at 483.

And by waiving his right to appeal, a defendant has *already* made a knowing and voluntary choice not to seek further merits consideration of issues within the scope of the waiver. See *Nunez* v. *United States*, 546 F.3d 450, 455 (7th Cir. 2008) ("Nunez *had* made a personal decision—a decision not to appeal. That's what the waiver was about."). Petitioner implicitly acknowledges as much, because he does not argue that a defendant has an autonomy interest in bringing claims barred by an appeal waiver. Cf. *Smith* v. *Robbins*, 528 U.S. 259, 278 (2000) (rejecting a "right to counsel for bringing a frivolous appeal"). A focus on the defendant's right to autonomy—properly understood to mean his right to appeal claims that he has not already voluntarily renounced—thus supports a case-specific approach that limits relief to such circumstances, not a per se rule that grants relief indiscriminately.[4]

3. Petitioner also contends (Br. 29) that prejudice must be presumed, rather than established on a case-by-case basis, because "it would be profoundly unfair" to require a defendant to prove that his potential appellate claims have merit before he is allowed to appeal them. Petitioner's argument misunderstands the case-specific showing that this Court's precedents would require.

Contrary to petitioner's suggestion (Br. 29-30), the prejudice inquiry would not require the defendant to establish that he would have *prevailed* on appeal, but only to establish "a reasonable probability" that counsel's

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[4] Petitioner also errs in relying on the obligations of counsel to "support his client's appeal to the best of his ability." Br. 27 (quoting *Anders* v. *California*, 386 U.S. 738, 744 (1967)). The right to the *Anders* procedure depends on having an "appeal[] as of right," 386 U.S. at 741, and does not apply to appeals that would be barred by a waiver. See *Nunez*, 546 F.3d at 455.

failure to notice an appeal has "actually" deprived him of merits review. See *Flores-Ortega*, 528 U.S. at 484. For that reason, "although showing nonfrivolous grounds for appeal" that were not waived "may give weight to the contention that the defendant would have appealed" on those grounds, the "defendant's inability to 'specify the points he would raise were his right to appeal reinstated' will not foreclose the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would have appealed" a claim that could have been considered. *Id.* at 486 (citation omitted). As noted, those "other substantial reasons" may include evidence that the defendant "expressed a desire," contemporaneously with or shortly after pleading guilty, to appeal an issue that fell outside his waiver. *Id.* at 485-486.

Petitioner asserts (Br. 31) that a defendant, proceeding pro se on collateral review, "may have severe difficulty identifying and articulating viable claims that fall outside the scope of his appeal waiver." But a defendant who knowingly and intelligently signed an appeal waiver presumably contemplated, when he did so, the effect that the waiver would have on his ability to appeal. He is therefore much better situated to articulate to the postconviction court what sort of appeal he might nevertheless have brought than is a defendant who did not sign such a waiver. Cf. *Flores-Ortega*, 528 U.S. at 486. And to the extent that such a defendant might assert that he did not understand what he was waiving, or that his attorney misadvised him about the waiver, he can raise those as separate postconviction claims.

In any event, any difficulty a defendant may face in identifying non-barred appellate claims is not a defect

in the case-specific approach, but instead an appropriate consequence of the defendant's own decision to waive appellate rights. The very purpose of an appeal waiver is to limit or eliminate appellate litigation. The constraining effects of an appellate waiver on a proceeding in which a defendant seeks to initiate appellate litigation thus provide no reason to *dispense* with a case-specific prejudice inquiry.

4. Petitioner's per se prejudice rule, furthermore, has little to recommend it as a practical matter. It will have few benefits, but would add significant litigation burdens, reduce the advantages of plea agreements, and potentially harm defendants themselves.

Even courts of appeals that have adopted petitioner's proposed rule have recognized that its application "will bestow on most defendants nothing more than an opportunity to lose." *Campusano* v. *United States*, 442 F.3d 770, 777 (2d Cir. 2006) (Sotomayor, J.); see *United States* v. *Poindexter*, 492 F.3d 263, 273 (4th Cir. 2007) ("[M]ost successful § 2255 movants in the appeal waiver situation obtain little more than an opportunity to lose at a later date."). That is unsurprising. Relieving defendants of the requirement to prove case-specific prejudice eliminates the traditional tool that courts employ to identify situations in which counsel's deficiencies may actually have mattered.

A presumptive-prejudice rule would give rise to more frivolous appeals. If the defendant is required to prove case-specific prejudice on collateral review, courts can decide on the papers whether the defendant has identified a claim that would have been raised and considered on appeal notwithstanding his waiver. But if prejudice is presumed, the defendant can automatically reopen the time for filing an appeal whenever

counsel fails to file a requested appeal, regardless whether any or all of the defendant's potential appellate claims were waived. The vast majority of appeal waivers are valid, and "an appeal in the teeth of a valid waiver is frivolous," *Nunez*, 546 F.3d at 455. Such frivolous appeals impose real costs on the courts and the government, as well as on appointed appellate counsel.

Petitioner observes (Br. 38) that some appellate courts following his rule have adopted summary-dismissal procedures that allow the government to move for dismissal if "it believes that claims raised are within the scope of the defendant's waiver." But even courts that permit such dismissal motions routinely "defer[ ] action on the Government's motion until receipt of the briefs," requiring the parties to brief the merits of the defendant's underlying claims anyway. *United States* v. *Monahan*, 405 Fed. Appx. 742, 742-743 (4th Cir. 2010) (per curiam), cert. denied, 563 U.S. 1001 (2011); see, *e.g.*, *United States* v. *Manning*, 755 F.3d 455, 456 (7th Cir. 2014); *United States* v. *Andrade-Martinez*, 536 Fed. Appx. 385, 385 (4th Cir. 2013) (per curiam). And even where an appeal is resolved on the basis of a dismissal motion, attorneys on both sides must expend the effort to draft and respond to such motions, and courts must decide them—work that provides no meaningful benefit in cases where only waived claims are at issue.

Indeed, as previously noted (see pp. 18, 20, *supra*), a defendant may be *harmed* by reinstatement of a waived appeal, because a breach of the plea agreement would release the prosecution from its own reciprocal obligations. This case well illustrates the point. In return for petitioner's waiver of appellate rights and other concessions, the State made substantial concessions of its own, including promises to forgo further state charges and to

refrain from referring petitioner for federal prosecution. Pet. App. 2a-3a. An appeal in breach of the waiver would be unfair to the State and could put those benefits to petitioner at risk. See *Nunez*, 546 F.3d at 455 ("[C]ounsel's duty to protect his client's interests militates against filing an appeal.").

Petitioner suggests (Br. 39) that a rule of presumptive prejudice will not open the "floodgates" because a defendant who seeks an appeal through collateral review will still have to prove "that he instructed his attorney to appeal." But that is burdensome in itself. A defendant may be able to initiate protracted litigation solely through allegations in an affidavit, which some courts (over the government's objection) treat as sufficient to require an evidentiary hearing—even where the defendant's trial counsel represents that the defendant in fact "never asked [him] to file a notice of appeal." *Rodriguez* v. *United States*, 741 F. Supp. 2d 344, 346 (D. Mass. 2010); see, *e.g.*, *Berrio-Callejas* v. *United States*, 129 F.3d 1252, 1997 WL 704419, at *1 (1st Cir. 1997) (Tbl.) (per curiam) ("The court had no authority to credit petitioner's counsel's letter over petitioner's."); *Underwood* v. *United States*, Nos. 14-cr-89, 15-cv-228, 2016 WL 554835, at *3 (E.D. Tenn. Feb. 10, 2016); *Martin* v. *United States*, Nos. 07-cr-17, 10-cv-461, 2012 WL 2061934, at *4, *6 (D. Me. June 7, 2012). An evidentiary hearing, in turn, will usually require testimony from trial counsel and the defendant, who must be transported to the court (which may be in a different district from the one in which he is imprisoned). Indeed, this Court has previously noted that, for some defendants, the "collateral attack may [itself] be inspired by a mere desire to be freed temporarily from the confines of the

prison." *Blackledge* v. *Allison*, 431 U.S. 63, 72 (1977) (citation and internal quotation marks omitted).

D. The Lower Courts Correctly Denied Relief Because Petitioner Failed To Show That He Sought To Appeal Any Claim That He Did Not Waive

The courts below correctly rejected petitioner's request for a direct appeal.

Petitioner's collateral-review petitions did not identify any appealable claim that petitioner lost as a result of counsel's failure to notice an appeal. Following conviction and sentencing, petitioner asked trial counsel to "appeal the sentence(s) of the court," Pet. App. 52a, without identifying any claim that was not covered by his appeal waiver. See CR 10 (petitioner claiming he asked his attorney to file "an appeal"). On collateral review, petitioner argued—separate from his ineffective-assistance claim—that his guilty pleas were not knowing and voluntary. Pet. App. 29a. But the trial court rejected that argument on the merits "for lack of supporting evidence," *ibid.*, and petitioner did not pursue it furtner. See *id.* at 31a n.1 (petitioner "has never contended that he did not appreciate or understand" the appeal waivers). Finally, when asked for any issues he wished to pursue on appeal that were "non-frivolous and not subject to dismissal as a result of his appeal waivers," petitioner identified only one issue, which was squarely foreclosed by his waiver: "whether the Court properly exercised its discretion in imposing the sentences to which he and the State agreed in the [Rule] 11(f)(1)(C) plea agreements." *Id.* at 31a-32a.

Petitioner thus failed to establish that he "promptly expressed a desire to appeal" an issue that was appealable notwithstanding his appeal waiver, or that "there were nonfrivolous grounds for appeal" despite the waiver.

Flores-Ortega, 528 U.S. at 485. Counsel's failure to appeal on petitioner's behalf, therefore, did not "actually cause" petitioner to forfeit appellate review of any claim. *Id.* at 484. Petitioner thus failed to establish that he received ineffective assistance of counsel.

CONCLUSION

The judgment of the Supreme Court of Idaho should be affirmed.

Respectfully submitted.

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SEPTEMBER 2018

No. 17-1026

In the Supreme Court of the United States

Gilberto Garza, Jr.,

Petitioner,

v.

State of Idaho,

Respondent.

On Writ of Certiorari to the Supreme Court of Idaho

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Does the "presumption of prejudice" recognized in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE CONSTITUTION PROTECTS THE AUTONOMY OF CRIMINAL DEFENDANTS TO MAKE FUNDAMENTAL DECISIONS ABOUT THEIR CASES. 5

II. OVERRULING A DEFENDANT'S DECISION TO FILE AN APPEAL VIOLATES DEFENDANT AUTONOMY. 10

III. SECURING DEFENDANT AUTONOMY NOTWITHSTANDING APPEAL WAIVERS IS ESPECIALLY CRUCIAL IN LIGHT OF THE INCREASING PREVALENCE OF PLEA BARGAINING. 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. U.S. ex rel. McCann, 317 U.S. 269 (1942) .. 8
Boykin v. Alabama, 395 U.S. 238 (1969) 8
Brookhart v. Janis, 384 U.S. 1 (1966) 8
Campbell v. United States,
686 F.3d 353 (6th Cir. 2012) 3
Campusano v. United States,
442 F.3d 770 (2d Cir. 2006) 3
Cross v. United States,
325 F.2d 629 (D.C. Cir. 1963) 9
Doughty v. State, 470 N.E.2d 69 (Ind. 1984) 8
Faretta v. California, 422 U.S. 806 (1975) 2, 5, 6, 8
Garza v. State, 162 Idaho 791 (Idaho 2017) 13
Gomez-Diaz v. United States,
433 F.3d 788 (11th Cir. 2005) 3
Indiana v. Edwards, 554 U.S. 164 (2008) 6, 7
Jones v. United States, 526 U.S. 227 (1999) 16
Lafler v. Cooper, 566 U.S. 156 (2012) 16
Lee v. United States, 137 S. Ct. 1958 (2017) 12
Martinez v. Court of Appeal of Cal.,
Fourth Appellate Dist., 528 U.S. 152 (2000) 14
McCoy v. Louisiana, 138 S. Ct. 1500 (2018) 2, 9
McKaskle v. Wiggins, 465 U.S. 168 (1984) 6, 7
Nunez v. United States,
546 F.3d 450 (7th Cir. 2008) 13
Peguero v. United States, 526 U.S. 23 (1999) 3, 10
Rock v. Arkansas, 483 U.S. 44 (1987) 6, 9
Roe v. Flores-Ortega, 528 U.S. 470 (2000) 2, 9, 10
Taylor v. Illinois, 484 U.S. 400 (1988) 8
United States v. Garrett,
402 F.3d 1262 (10th Cir. 2005) 3

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) 8
United States v. Mabry,
536 F.3d 231 (3d Cir. 2008) 13
United States v. Poindexter,
492 F.3d 263 (4th Cir. 2007) 3
United States v. Sandoval-Lopez,
409 F.3d 1193 (9th Cir. 2005) 3
Wainwright v. Sykes, 433 U.S. 72 (1977) 8
Watson v. United States,
493 F.3d 960 (8th Cir. 2007) 3
Weaver v. Massachusetts, 137 S. Ct. 1899 (2017). 7

Other Authorities

Alafair S. Burke, *Prosecutorial, Passion, Cognitive Bias, and Plea Bargaining*,
91 MARQ. L. REV. 183 (2007) 17
Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 HOFSTRA L. REV. 87 (2017).... 17
DNA Exonerations in the United States,
INNOCENCE PROJECT 17
Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*,
90 B.U. L. REV. 1147 (2010) 7
George Fisher, *Plea Bargaining's Triumph*,
109 YALE L.J. 857 (2000) 16
J.F. Reinganum, *Plea Bargaining & Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988) 17
Jed S. Rakoff, *Why Innocent People Plead Guilty*, The New York Review of Books (Nov. 20, 2014) 17
Suja A. Thomas, *What Happened to the American Jury?*, LITIGATION, Spring 2017 16

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's concern in this case is defending and securing the principle of defendant autonomy, and ensuring that the increasing pervasiveness of plea bargaining does not further erode the participation of citizen juries in the criminal justice system, or deprive defendants of the right to subject the government's case to meaningful adversarial testing.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Criminal defense is personal business. A criminal defendant may never face a more momentous occasion than his prosecution, nor one where his decisions have greater personal consequence. This Court has therefore recognized that the Constitution "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). The Court recently affirmed this principle in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), holding that the Sixth Amendment secures "a defendant's . . . autonomy," *id.* at 1511, and that violations of autonomy do not require a showing of prejudice. Rather, such a violation is "complete when the court allow[s] counsel to usurp control of an issue within [the defendant's] sole prerogative." *Id.*

This principle of defendant autonomy has received the most attention in the context of trial rights, but it applies equally when a defendant decides whether to appeal his conviction—whether that conviction was obtained as the result of a trial or a guilty plea. This Court has repeatedly held that "the accused has the ultimate authority to make certain fundamental decisions regarding the case," and that these decisions include whether to "take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citing *Wainwright v. Sykes*, 433 U.S. 72, 93, n.1 (1977) (Burger, C. J., concurring)); *see also McCoy*, 138 S. Ct. at 1508 (citing *Jones*).

The remedial side of this right was addressed in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), which held that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a

manner that is professionally unreasonable," *id.* at 477, and that in such a circumstance, "a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit," *id.* (quoting *Peguero v. United States*, 526 U.S. 23, 28 (1999)) (alteration in original). Thus, although the *Flores-Ortega* Court did not explicitly refer to the defendant's right to decide whether to appeal as "structural," the practical effect of presuming prejudice for its denial is exactly the same. *Cf. McCoy*, 138 S. Ct. at 1511 ("Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review.").

The question in this case is, essentially, whether the bedrock principle of defendant autonomy should be discarded when defendants waive certain appeal rights as part of a plea bargain. Eight federal circuit courts have correctly answered this question "no," and held that *Flores-Ortega* presents a categorical rule: attorneys may never disregard a client's express instructions to file a notice of appeal.[2] This rule is eminently sensible, because so-called "appeal waivers" can never actually waive *all* of a defendant's appeal rights. As Petitioner notes, "Defendants who sign even the broadest appeal waivers nevertheless retain the right

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[2] *See Campbell v. United States*, 686 F.3d 353, 360 (6th Cir. 2012); *United States v. Poindexter*, 492 F.3d 263, 265 (4th Cir. 2007); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007); *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007); *Campusano v. United States*, 442 F.3d 770, 775 (2d Cir. 2006); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1198 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262, 1267 (10th Cir. 2005); *Gomez-Diaz v. United States*, 433 F.3d 788, 794 (11th Cir. 2005).

to appeal a number of fundamental issues concerning the validity, scope, and enforceability of their plea agreement and waiver." Br. for Pet'r, at 16. Defendants are thus entitled to instruct their attorneys to file appeals, notwithstanding the content of their pleas.

To justify its alternative conclusion, the Idaho Supreme Court (like the two federal circuits in the minority position), relied in large part on the argument that "[i]f an attorney files an appeal despite a waiver in the plea agreement, the agreement may be breached, and the State may now be entitled to disregard the plea in its entirety." *Garza v. State*, 162 Idaho 791, 798 (Idaho 2017). That is, to be sure, an important practical consideration for attorneys to discuss with their clients—but it is ultimately the defendant's choice to decide how to weigh that risk. When it comes to those fundamental matters within the scope of a criminal defendant's autonomy, this Court has repeatedly rejected similar paternalistic arguments for overriding a defendant's informed, voluntary decision. There is no reason this case should be any different.

Finally, securing a defendant's fundamental right to decide whether to appeal a conviction—even when obtained through a plea bargain with an appeal waiver—is especially important in light of the increasing prevalence of plea bargaining, rather than jury trials, as the default means of adjudicating criminal cases. In light of the concerning fact that plea bargains of dubious legitimacy make up the overwhelming percentage of today's criminal convictions, it is all the more important to ensure that defendants are guaranteed the right to decide whether and how to challenge the lawfulness of their pleas.

ARGUMENT

I. THE CONSTITUTION PROTECTS THE AUTONOMY OF CRIMINAL DEFENDANTS TO MAKE FUNDAMENTAL DECISIONS ABOUT THEIR CASES.

The principle of defendant autonomy underlies this Court's decisions in a wide range of contexts: most notably, self-representation, choice of counsel, and the defendant's authority to make fundamental decisions in his case, even when represented by counsel—including the decision whether to take an appeal. Taken as a whole, this jurisprudence establishes that autonomy is a bedrock principle of the Sixth Amendment, and due process more generally.

1. Defendant autonomy received robust consideration in *Faretta v. California*, 422 U.S. 806 (1975), and in the Court's subsequent self-representation cases. But in holding that a defendant has the right to represent himself, the Court relied on the larger and more fundamental right "to make one's own defense personally," *id.* at 819, of which self-representation is only one component.

The holding in *Faretta* was not just an interpretation of the Assistance of Counsel Clause, nor a mere inference from the general capacity of defendants to waive constitutional rights. *See* 422 U.S. at 819 n.15 ("Our concern is with an independent right of self-representation. We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel."). Instead, self-representation was "necessarily implied by the structure of the [Sixth] Amendment," and an instance of those

constitutional rights that "though not literally expressed in the document, are essential to due process of law in a fair adversarial process." *Id.* at 819 & n.15.[3]

The extensive legal history of the right to self-representation discussed in *Faretta* underscores the historical basis for defendant autonomy more generally. *See id.* at 821–32. Many of the Colonial Era sources relied upon by the Court explicitly grounded this right in the natural liberty of all free persons. *See id.* at 828 n.37 (Pennsylvania Frame of Government of 1682 provided that "in all courts all persons of all persuasions may freely appear in their own way"); *id.* at 829 n.38 (Georgia Constitution in 1777 secured "that inherent privilege of every freeman, the liberty to plead his own cause"); *id.* at 830 n.39 (Thomas Paine, in support of the 1776 Pennsylvania Declaration of Rights, argued that people have "a natural right to plead [their] own case").

The subsequent self-representation case law reinforces this autonomy-driven understanding of *Faretta*. *McKaskle v. Wiggins* explicitly confirms that "the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy." 465 U.S. 168, 178 (1984). *See also Indiana v. Edwards*, 554 U.S. 164, 176 (2008) ("'[d]ignity' and 'autonomy' of individual underlie self-representation right"). In *Rock v. Arkansas*, the Court held that "an accused's right to present his own version of events in his own words" was "[e]ven more funda-

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[3] The Court gave as examples a defendant's right "to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, to testify on his own behalf, and to be convicted only if his guilt is proved beyond a reasonable doubt." *Faretta v. California*, 422 U.S. 806, 819 n.15 (citations omitted).

mental to a personal defense than the right of self-representation." 483 U.S. 44, 52 (1987). In other words, the right to a "personal defense"—the defendant's autonomy—is the fountainhead from which flow specific procedural guarantees. And in *Weaver v. Massachusetts*, the Court explained that the right to self-representation "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." 137 S. Ct. 1899, 1908 (2017).

Even where the Court has identified the limits of the right to self-representation, it has generally done so in a manner that tracks the limits of autonomy itself. *See, e.g., Edwards*, 554 U.S. at 176–77 (dignity and autonomy interests are not served when defendant lacks the mental capacity to conduct his defense in the first place);[4] *McKaskle*, 465 U.S. at 185 (limited participation of standby counsel at trial did not violate right to self-representation when the *pro se* defendant maintained "actual control of the defense").

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[4] It could reasonably be argued that an autonomy-driven understanding of self-representation mandates a different outcome than the one reached in *Indiana v. Edwards*, and that mentally ill defendants—when competent to stand trial—should be permitted to elect self-representation. *See* 554 U.S. 164, 187 (2008) ("[I]f the Court is to honor the particular conception of 'dignity' that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made.") (Scalia, J., dissenting). But regardless of whether *Edwards* was rightly decided, both the majority and the dissent agreed on autonomy as the foundational principle; they simply disagreed on its application in the area of mental illness. *See generally* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1184–87 (2010) (discussing the complicated relationship between mental illness and defendant autonomy).

2. Just as a defendant's autonomy guarantees the right to self-representation, it also supports the right to retained counsel of one's *choice*. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). The Assistance of Counsel Clause does not discuss "choice of counsel" in so many words, but the "right to select counsel of one's choice . . . has been regarded as the root meaning of the constitutional guarantee." *Id.* at 147–48. It is not just a procedural protection for the accused, but rather a reflection of the larger right to a personal defense. This component of the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel *he believes* to be best." *Id.* at 146 (emphasis added).

3. Once a defendant chooses to be represented by counsel, "law and tradition may allocate to the counsel the power to make binding decisions of strategy in many areas." *Faretta*, 422 U.S. at 820. But a defendant retains "ultimate authority to make certain fundamental decisions regarding the case." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring)). These "fundamental decisions" include whether to enter a guilty plea[5] (or the functional equivalent of a guilty plea),[6] waive the right to a jury trial,[7] waive the

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[5] *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

[6] *Brookhart v. Janis*, 384 U.S. 1, 6–7 (1966) (counsel lacked authority to agree to a "prima facie" trial that was equivalent to a guilty plea).

[7] *Taylor v. Illinois*, 484 U.S. 400, 417–18 & n.24 (1988) (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)); *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 277 (1942).

right to be present at trial,[8] testify on one's own behalf,[9] maintain innocence before a jury,[10] and—most notably for the present case—whether to take an appeal.[11]

In general, these "fundamental decisions" speak to one or both of two major sets of questions in which concerns for defendant autonomy are at their peak. First, a defendant has the authority to decide, as a threshold matter, whether to avail himself of certain structural elements of the criminal justice system—i.e., by entering a plea, waiving a jury trial, or taking an appeal. Second, the defendant has final authority over his *personal* involvement (or non-involvement) in his case, and the fundamental goals of his defense—i.e., his attendance at trial, the decision to testify (and what to say), and how to weigh the risks of an adverse verdict or sentence (including whether to take a plea, and whether to admit guilt before the jury). As this Court recently explained, such decisions "are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *McCoy v. Lousiana*, 138 S. Ct. 1500, 1508 (2018).

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[8] *Taylor*, 484 U.S. at 417–18 & n.24 (citing *Cross v. United States*, 325 F.2d 629, 632–33 (D.C. Cir. 1963)).

[9] *Jones*, 463 U.S. at 751; *see also Rock v. Arkansas*, 483 U.S. 44, 49 (1987) ("[I]t cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.").

[10] *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018).

[11] *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Jones*, 463 U.S. at 751.

II. OVERRULING A DEFENDANT'S DECISION TO FILE AN APPEAL VIOLATES DEFENDANT AUTONOMY.

The general rules governing this case have already been explicitly stated in prior decisions of this Court. The Court has repeatedly instructed that, even when a defendant accepts the assistance of counsel, "[s]ome decisions . . . are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *McCoy*, 138 S. Ct. at 1508 (citing *Jones*, 463 U.S. at 751 (1983)). And specifically in the context of appeals, the Court has clarified that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Such a refusal of the client's wishes "cannot be considered a strategic decision," *id.*, and the defendant need not show prejudice to obtain a new appeal, *id.* (citing *Peguero v. United States*, 526 U.S. 23, 28 (1999)).[12]

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[12] *Flores-Ortega* construed the problem with counsel refusing a defendant's request to file an appeal as one of ineffective assistance. 528 U.S. at 476–77. While ineffective assistance claims generally require a showing of prejudice, *see Strickland v. Washington*, 466 U.S. 668, 692 (1984), the *Flores-Ortega* Court indicated that counsel's refusal to file an appeal would constitute one of those contexts in which prejudice is presumed. *See* 528 U.S. at 483.

Amicus suggests that a more coherent framework for understanding Mr. Garza's right in this case is autonomy, not ineffective assistance. As this Court recently explained in *McCoy*, "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural';

Here, there is no dispute that Mr. Garza instructed his trial counsel to file an appeal, and that his attorney refused this request. *Flores-Ortega* would thus seem to squarely govern this case. But the Idaho Supreme Court decided that the rule in *Flores-Ortega* should not apply, because Mr. Garza's plea agreement included a waiver of his right to take an appeal. But this is neither a principled nor practical reason to depart from the clear autonomy-baseline set forth in *Flores-Ortega* and subsequent cases.

1. As a threshold matter, and as explained in detail by Petitioner, no waiver can ever genuinely extinguish *all* of a defendant's rights on appeal. At the very least, the defendant necessarily retains his right to raise issues concerning the plea agreement itself, including its scope and enforceability, and whether it was entered into voluntarily. *See* Br. for Pet'r, at 16–18. Petitioner also explains how, notwithstanding the presumptive validity of appeal waivers, courts often do *not* apply this presumption to certain sufficiently fundamental constitutional rights. *See id.* at 18–20. Thus, no matter the content of the plea agreement, there will *always* be a live and meaningful question about

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when present, such an error is not subject to harmless-error review." 138 S. Ct. at 1511. *McCoy* likewise confirmed that the right to decide whether to take an appeal is one of these "autonomy" rights. *See id.* at 1508. Therefore, instead of framing the issue as whether or not prejudice should be presumed, it would make more sense to simply hold that the defendant's right to decide whether to take an appeal is a structural autonomy right, and prejudice is not required in the first place. Nevertheless, the practical result is the same—Mr. Garza's constitutional rights were violated, and he is entitled to a new appeal without the need to affirmatively demonstrate prejudice.

whether to take an appeal—and that decision is within the defendant's sole discretion.

But even assuming that a valid appeal waiver were to substantially reduce the likelihood of success on appeal,[13] the Court has repeatedly affirmed the authority of defendants to make fundamental decisions, even with only miniscule chances of success. In a similar context, this Court recently held that a defendant can show he would not have pleaded guilty if he knew he could be deported, even though he had no realistic defense:

> But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. . . . Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Lee v. United States, 137 S. Ct. 1958, 1968–69 (2017).

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[13] The additional *amici* supporting Petitioner explain how, in fact, defendants are often successful on appeal, notwithstanding waivers in plea agreements. *See* Br. of Idaho Ass'n of Crim. Def. Lawyers & Nat'l Ass'n of Crim. Def. Lawyers as *Amici Curiae* in Supp. of Pet'r., at 5–20. This is an important and enlightening point. But even were it not so, respect for defendant autonomy cannot rise and fall on the statistical likelihood of success.

Similarly, in *McCoy v. Louisiana*, the Court affirmed the authority of a defendant to decide whether to maintain his innocence in his jury trial—notwithstanding that it was a capital case with apparently overwhelming evidence, and in which his counsel thought admitting guilt was the only realistic means of avoiding the death penalty. *See* 138 S. Ct. at 1508 (noting that the defendant "may hold life in prison not worth living and prefer to risk death *for any hope, however small, of exoneration*") (emphasis added).

2. The primary practical concern driving the lower court's decision—as well as the decisions of the two other circuits that have adopted this minority position—seems to be the idea that an attorney has a duty to protect the client from the possible negative consequences of filing an appeal after he has executed a waiver in his plea. *See Garza v. State*, 162 Idaho 791, 798 (Idaho 2017) ("If an attorney files an appeal despite a waiver in the plea agreement, the agreement may be breached, and the State may now be entitled to disregard the plea in its entirety."); *see also Nunez v. United States*, 546 F.3d 450, 455 (7th Cir. 2008) ("The prosecutor made substantial concessions to Nunez. An appeal would have put them in jeopardy . . . . Protecting a client from harm is a vital part of a lawyer's job."); *United States v. Mabry*, 536 F.3d 231, 240 (3d Cir. 2008) (noting that filing an appeal in the face of a waiver "could cost the client the benefit of the plea bargain against his or her best interest").

This is, to be sure, an important practical consideration, and attorneys certainly have an obligation to inform their clients of the possible negative consequences of filing an appeal under such circumstances.

But once a client is fully informed, refusing to give effect to the client's final decision on such grounds is exactly the sort of paternalistic argument that the Court has rejected again and again in cases concerning defendant autonomy.

In the context of self-representation, for example, the Court has candidly acknowledged that "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Faretta*, 422 U.S. at 834. Nevertheless, the Court held, "[p]ersonal liberties are not rooted in the law of averages," *id.*, and though the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law,'" *id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (Brennan, J., concurring)). *See also Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people.").

In many ways, this case presents exactly the same type of question that Court decided just last term, in *McCoy v. Louisiana*. There, the Court confirmed the defendant's sole prerogative to decide whether to admit guilt or maintain innocence before a jury, notwithstanding his attorney's judgment that admitting guilt was the only feasible way to avoid the death penalty. 138 S. Ct. at 1508. The issue in *McCoy* was not whether his attorney's judgment was *reasonable*; rather, the Court recognized that what is at stake in such cases is more than just trial strategy—the defendant

is ultimately entitled to weigh the competing value judgments that go into such a momentous decision. *See id.* ("Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty . . . . But the client may not share that objective.").

Just so here. Counsel may reasonably assess that a waiver makes the likelihood of success on appeal quite small, and that such an appeal would risk the defendant losing the benefits of the plea. But the defendant may not share the objective of preserving at all costs such supposed benefits. He might know, for example, that the plea was not truly involuntary, and therefore insist as a matter of his own integrity that the plea be challenged, though the likelihood of proving as much be slim. Or he may simply prefer any chance of exoneration, however small, over whatever reduced sentence was offered in his plea. If defendants are permitted to risk the *death penalty* in the assertion of their own autonomy, then *a fortiori* they should be permitted to decide whether to risk losing the benefits of a plea agreement.

III. SECURING DEFENDANT AUTONOMY NOTWITHSTANDING APPEAL WAIVERS IS ESPECIALLY CRUCIAL IN LIGHT OF THE INCREASING PREVALENCE OF PLEA BARGAINING.

The defendant's inherent right to make fundamental decisions in his own case (including the decision whether to appeal a conviction) is the core concern of the Sixth Amendment and the chief issue relevant to this appeal. But the fact that the State's proposed exception to defendant autonomy turns on appeal waivers in plea agreements is especially troubling, given the degree to which plea bargaining has become the

default, not the exception, in our criminal justice system.

The criminal jury trial—that bedrock on which our criminal justice system is founded—is dwindling to a point of a practical nullity. Plea bargaining, though essentially unknown to the Founders, has reduced the country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance"). The Framers understood that "the jury right [may] be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, LITIGATION, Spring 2017, p. 25 ("[J]uries today decide only 1–4 percent of criminal cases filed in federal and state court.").

The decline of the jury trial is all the more troubling given the vast coercive power that prosecutors can bring to bear on most defendants in plea negotiations, and the resultant concern that many (if not most) pleas are not truly voluntary—nor limited even to guilty defendants. Prosecutors control charging decisions (often charging defendants with mandatory minimum sentences), the discovery provided to defendants prior to a plea, and the terms of plea bargains, which often dictate sentencing and post-release conditions, with little

if any oversight by judges. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, The New York Review of Books (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/. Indeed, jury trials declined substantially following the imposition of mandatory minimum sentences for drug and other offenses in the 1980s, with 19 percent of federal defendants going to trial in 1980 and less than 3 percent in 2010, a figure that continues to this day. *Id.*

With little judicial oversight, plea bargains take place behind closed doors and with prosecutors in a substantially better bargaining position relative to defense lawyers, as they have access to police reports, crime scenes, witnesses, and other evidence before most defense lawyers are even involved in cases. *See* J.F. Reinganum, *Plea Bargaining & Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988). As many commentators have observed, regardless of whether their evidence is accurate or reliable, prosecutors tend to exhibit confirmation bias about the strength of their cases, which makes them overconfident in defendants' guilt. Rakoff, *supra*; Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 HOFSTRA L. REV. 87, 105–06 (2017); Alafair S. Burke, *Prosecutorial, Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007). It is thus unsurprising that, for example, of the 358 individuals exonerated by the Innocence Project through DNA evidence, 40 of them—over 10%—actually pled guilty to crimes we now know with practical certainty they did not commit. *See* DNA Exonerations in the United States, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited August 17, 2018).

Against this background, the State's suggestion that defendant autonomy may be dispensed with in light of the terms of a plea agreement is cause for special concern, not relief. There is ample reason to think that a substantial number of plea agreements are tinged with coercion, secured largely through the threat of massive trial penalties, and entered into by defendants with little-to-no knowledge of the government's supposed case against them. Many such defendants may, in fact, be innocent. That is a difficult structural problem with no easy solutions. But the least we can do is preserve the autonomy of criminal defendants to decide whether to challenge their convictions on appeal—*especially* when those convictions are obtained through plea bargains of dubious legal and moral legitimacy.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should reverse the lower court's judgment.

Respectfully submitted,

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GILBERTO GARZA JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF OF *AMICUS CURIAE* THE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. A Lawyer May Not Override a Client's Decision to File a Notice of Appeal Because the Client Signed a Plea Agreement with an Appeal Waiver 7

A. The Client, Not the Lawyer, Has the Authority to Decide Whether to Appeal. 7

B. Because All Appeal Waivers Are Partial, the Mere Existence of a Plea Waiver Could Never Render the Filing a Notice of Appeal Frivolous. 8

C. The Client Retains Full Control Over the Decision to File a Notice of Appeal, Even if a Court Later Determines that an Argument Made on Appeal Breached the Plea Agreement. 12

II. Counsel's Failure to File a Notice of Appeal, Over Mr. Garza's Express Wishes, Violated the Most Basic Principle of Agency Law and Is Presumptively Prejudicial 15

A. A Lawyer Who Deliberately Disregards a Client's Instructions to File a Notice of Appeal Violates the Lawyer's Obligations of Loyalty by Disobeying the Client's Lawful Direction 15

B. Counsel's Decision Not to File a Notice of Appeal Is Presumptively Prejudicial Because It Forfeited Mr. Garza's Right to an Entire Judicial Proceeding 17

III. The Court Should Establish a Clear Rule that Prevents Lawyers from Sacrificing a Client's Clearly Expressed Desire to a Constitutional Right. 20

A. Lawyers Need a Clear Rule to Understand Their Obligation to Their Clients to File a Notice of Appeal 20

B. If This Court Does Not Presume Prejudice Here, Defendants Will Have No Choice but to Proceed Pro Se to Demonstrate Prejudice Because They Had Constitutionally Deficient Trial Counsel Who Failed to Obey Them 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Anders v. California,
386 U.S. 738 (1967) 3, 9, 10, 23

Coleman v. Thompson,
501 U.S. 722 (1991) 5, 19, 24

Comm'r. v. Banks,
543 U.S. 426 (2005) 4, 15

Douglas v. California,
372 U.S. 353 (1963) 24, 25, 26

Faretta v. California,
422 U.S. 806 (1975) 12, 13, 15, 26

Florida v. Nixon,
543 U.S. 175 (2004) 3

Gonzalez v. United States,
553 U.S. 242 (2008) 16

Holland v. Florida,
560 U.S. 631 (2010) 4, 18, 19

Illinois v. Allen,
397 U.S. 337 (1970) 13

Jones v. Barnes,
463 U.S. 745 (1983) 3

Maples v. Thomas,
565 U.S. 266 (2012) 18, 19

McCoy v. Court of Appeals of Wisconsin,
486 U.S. 429 (1988) 8, 10, 11-12

McCoy v. Louisiana,
138 S. Ct. 1500 (2018) 3, 7, 16

Penson v. Ohio,
488 U.S. 75 (1988) 3, 10

Ricketts v. Adamson,
483 U.S. 1 (1987) 13, 14

Rodriquez v. United States,
395 U.S. 327 (1969) 3, 17

Roe v. Flores-Ortega,
528 U.S. 470 (2000) ..... *passim*

Smith v. Robbins,
528 U.S. 259 (2000) 12, 17

State v. McKenney,
98 Idaho 551 (1977) 9

Strickland v. Washington,
466 U.S. 668 (1984) 7

United States v. Mezzanatto,
513 U.S. 196 (1995) 11, 25

Weaver v. Massachusetts,
137 S. Ct. 1899 (2017) 12

CONSTITUTIONAL PROVISION

U.S. CONST. amend. VI 2, 7, 8, 15

RULES

Fed. R. App. P. 4 20

Fed. R. Crim. P. 11(b)(1)(N) 11

Fed. R. Crim. P. 37.6 1

Idaho Crim. R. 11(d)(3) 11

Idaho Crim. R. 14 20

Idaho App. R. 45.1(b) 22

Model R. Prof'l Conduct r. 1.2(a) 14

Model R. Prof'l Conduct r. 1.2(d) 14

Model R. Prof'l Conduct r. 2.1 14

Model R. of Prof'l Conduct r. 3.1
(Am. Bar Ass'n 1983) 9

OTHER AUTHORITIES

ABA Standards for Criminal Justice
Prosecution Function and Defense Function
Standard 4-3.6 (3d ed. 1993) 21

ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.2 (3d ed. 1993) 22

ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3 (3d ed. 1993) 20, 23

ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-9.1 (4th ed. 2015)..... 5

ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 9.1(b) (4th ed. 2015) 7, 8, 21

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Restatement (Second) of Agency § 13 (Am. Law Inst. 2000) 15

Restatement (Second) of Agency § 39 (Am. Law Inst. 2000) 15

Restatement (Second) of Agency § 112 (Am. Law Inst. 1957) 19

Restatement (Second) of Agency § 387 (Am. Law Inst. 2000) 15, 16

Restatement (Second) of Agency § 394 (Am. Law Inst. 1957) 19

Restatement (Third) of Agency § 8.09(2) (Am. Law Inst. 2006) 4, 15, 16

Restatement (Third) of the Law Governing Lawyers § 22(1) (Am. Law Inst. 2000) 8

Restatement (Third) of the
Law Governing Lawyers § 23
(Am. Law Inst. 2000). 14

Restatement (Third) of
Law Governing Lawyers § 31
(Am. Law Inst. 1998) 19

Restatement (Third) of the Law Governing
Lawyers § 110 (Am. Law Inst. 2000) 9

Restatement (Third) of the Law Governing
Lawyers § 110(1) (Am. Law Inst. 2000) 9

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INTEREST OF *AMICUS CURIAE*[1]

The Ethics Bureau at Yale is a clinic composed of fourteen law students supervised by an experienced practicing lawyer, lecturer, and ethics teacher. The Bureau has drafted *amicus* briefs in matters involving lawyer and judicial conduct and ethics; has assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility; and has provided assistance, counsel, and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Amicus has no direct interest in the outcome of this litigation. Because this case implicates a lawyer's ethical obligation to further his client's objectives by obeying his client's lawful direction, the Bureau believes it might assist the Court in resolving the important issues presented.

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[1] Pursuant to Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *Amicus* and its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. The Ethics Bureau at Yale is a student clinic of Yale Law School. The views expressed herein are not necessarily those of Yale University or Yale Law School.

SUMMARY OF ARGUMENT

This Court's Sixth Amendment jurisprudence, as well as long-standing professional responsibility principles and agency law, make clear that a presumption of prejudice applies when a criminal defendant asks his lawyer to file a notice of appeal, but the lawyer fails to do so, relying for his inaction on the defendant's plea agreement that included an appeal waiver. To have this Court decide otherwise would allow lawyers to breach the most basic of fiduciary duties to their clients: the obligation of loyalty to obey a client's lawful decisions regarding the objectives of the representation.

The facts of this case are straightforward and undisputed. In 2015, Gilberto Garza, Jr. entered into two plea agreements: an *Alford* plea to aggravated assault and a guilty plea to possession of a controlled substance. Both plea agreements include a provision stating that Mr. Garza "waives his right to appeal." Pet. App. at 44a, 49a. Mr. Garza subsequently informed his lawyer via numerous phone calls and letters that he wanted to appeal his sentence. *Id.* at 3a. But despite this instruction, counsel did not file a notice of appeal, because he concluded that "Mr. Garza [had] received the sentence(s) he bargained for" and that "an appeal was problematic because [Mr. Garza] waived his right to appeal." *Id.* at 52a. Mr. Garza filed a pro se petition for post-conviction relief, alleging that his lawyer rendered ineffective assistance of counsel by refusing to file to a notice of appeal at his request. *Id.* at 3a. The Supreme Court of Idaho affirmed the District Court's and Court of Appeals' denial of relief.

Clients have the sole authority to decide whether they will file an appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)) (noting that the "accused has [the] ultimate authority to make [the] fundamental decision [of] whether to take an appeal"); *see also McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (stating that the decision to "forgo an appeal" is "reserved for the client"); *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (same). It is a fundamental precept of the ethical obligations of lawyers in the American constitutional tradition that the client, not the lawyer, has the final say over the objectives of the representation. In giving meaning to that precept, this Court requires courts to presume prejudice when a lawyer fails to file a notice of appeal after the client requests that one be filed. *See Rodriquez v. United States*, 395 U.S. 327 (1969).

That presumption applies here, where counsel unilaterally decided that filing a notice of appeal would be unwise. The law protects the client's right to file an appeal, including an appeal that non-judicial actors may deem imprudent or even frivolous. *See Anders v. California*, 386 U.S. 738, 744 (1967) (describing a method for court-appointed lawyers to withdraw from an appeal they consider meritless while still zealously advocating for their clients); *see also Penson v. Ohio*, 488 U.S. 75, 81-85 (1988) (affirming the importance of *Anders* briefs). If a lawyer cannot undermine a client's appeal based on the lawyer's unilateral conclusion that the client's appeal is frivolous, then certainly the lawyer cannot make that same unilateral decision during the window to file a notice of appeal.

Contrary to a claim of the Idaho Supreme Court, requiring lawyers to file notices of appeal even if their clients entered plea agreements with appeal waivers is far from an "exercise in futility." Pet. App. at 13a (internal quotation marks omitted). Rather, it is essential that a court independently review the merits of an appeal, because all appellate waivers can only bar a subset of potential appeals. This is true even if the client, after consultation with the appellate lawyer, makes arguments on appeal that could breach the client's plea agreement. The client retains the power and right to file a notice of appeal, even though that choice risks triggering additional consequences. Mr. Garza's personal decision to exercise his right to appeal cannot be summarily blocked by his own lawyer.

Principles of agency law likewise mandate that prejudice be presumed when a lawyer ignores a client's instructions and fails to file a notice of appeal because the client agreed to an appeal waiver. Agency law prescribes that lawyers, as their clients' agents, have a clear duty to follow a client's lawful instructions. *See* Restatement (Third) of Agency § 8.09(2) (Am. Law Inst. 2006). Notably, the attorney-client relationship requires that the client, as the principal, maintain "ultimate autonomous dominion over the underlying claim." *Comm'r. v. Banks*, 543 U.S. 426, 436 (2005). When a lawyer fails to follow a client's express and lawful instructions, the lawyer not only violates his or her duties as an agent, but also leaves the client with no lawyer at all. *See Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring in judgment) (noting that "a litigant cannot be held constructively responsible for the conduct of an

attorney who is not operating as his agent in any meaningful sense of that word").

This assault on the attorney-client relationship is particularly striking in the post-waiver context, because by not filing a notice of appeal as instructed by the client, the lawyer robs the client of an entire judicial proceeding. This Court has concluded that such a serious denial of an appellate proceeding is per se prejudicial. *See Flores-Ortega*, 528 U.S. at 483. Prejudice should therefore be presumed here, because long-standing, basic agency law principles require lawyers to obey their clients' instructions. This obedience is a crucial aspect of lawyers' respect for protecting their client's constitutional rights, as well as their client's autonomy.

As a clinic concerned with professional responsibility issues, we think it essential that lawyers recognize that this situation is presumptively prejudicial. Lawyers need only file a notice of appeal to comply with their clients' wishes. The task of reviewing the client's case for the existence of meritorious grounds for appeal—something that the American Bar Association requires—will be undertaken by appellate counsel. *See* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 9.1 (4th ed. 2015).

Likewise, defendants are entitled to a lawyer on appeal, but not in post-conviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Therefore, if this Court does not presume prejudice when a lawyer refuses to respect his client's decision to file a notice of appeal, the client will be left to prove,

pro se, in post-conviction proceedings that prejudice existed.

A constitutionally deficient trial lawyer who neglects a client's express instructions deprives the client of the benefit of a constitutionally competent lawyer on appeal. The outcome of a criminal proceeding should be determined in a fair and uniform way—not through a game of procedural Russian Roulette where a client's access to essential structural protections depends on the whims of an individual, disloyal lawyer.

In light of these considerations, *Amicus* urges this Court reverse the judgment of the court below.

ARGUMENT

I. A Lawyer May Not Override a Client's Decision to File a Notice of Appeal Because the Client Signed a Plea Agreement with an Appeal Waiver.

A. The Client, Not the Lawyer, Has the Authority to Decide Whether to Appeal.

The defendant's right to appeal is central to the protections provided by the Sixth Amendment, and it is one of only a handful of rights that this Court has specifically allocated to the defendant. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 ("Some decisions . . . are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal."). This Court has also concluded that the Sixth Amendment guarantees defendants effective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 686 (1984), and that a lawyer who ignores his or her client's instructions to file an appeal is presumed to have rendered ineffective assistance. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

Principles of legal ethics and agency law likewise prescribe that, throughout the course of a representation, the client retains control over final decisions and, specifically, the decision to appeal. The American Bar Association, for example, in adopting standards for prosecutors and defense lawyers, has announced that "[t]he ultimate decision whether to appeal should be the client's." ABA Standards for

Criminal Justice Prosecution Function and Defense Function Standard 4-9.1(b) (4th ed. 2015); *see also id.* 4-5.2 (noting that "[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are for defense counsel," and providing that the decisions to be made by defendants include "whether to appeal"). The Restatement of Law Governing Lawyers likewise observes that the decision to appeal a criminal prosecution is reserved to the client. *See* Restatement (Third) of the Law Governing Lawyers § 22(1) (Am. Law Inst. 2000).

In this case, Mr Garza clearly conveyed that he wanted to file a notice of appeal. His counsel violated the Sixth Amendment, as well as bedrock principles of legal ethics and agency law, by disregarding that direction. Counsel acknowledged that Mr. Garza instructed him to file a notice of appeal in counsel's affidavit in the District Court. *See* Pet. App. 52a. Once Mr. Garza established that as one of his objectives, his lawyer should not have deviated from that objective.

B. Because All Appeal Waivers Are Partial, the Mere Existence of a Plea Waiver Could Never Render the Filing a Notice of Appeal Frivolous.

This Court has recognized the tension between the constitutional right of defendants to have an active advocate on appeal and the professional obligation of counsel not to make frivolous arguments on appeal. *See McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 437 (1988). Yet its holdings have not wavered from the principle that defendants

have a right to file a notice of appeal and to have the effective assistance of counsel in doing so. Instead, this Court has addressed the problem of frivolous arguments by recommending that lawyers follow the procedure described in *Anders v. California*. 386 U.S. 738 (1967). That is, when a client asks a lawyer to file an appeal with potentially frivolous arguments, the lawyer should file the notice of appeal, submit "a brief referring to anything in the record that might arguably support the appeal," and request permission to withdraw. *Anders*, 386 U.S. at 744.[2] This procedure, requiring lawyers to file "*Anders* briefs," allows defense counsel to act "with honor and without conflict," while even more importantly preserving defendants' right to appeal. *Id.*

Principles of legal ethics strike a similar balance between defendants' constitutional right to counsel and lawyers' professional obligation not to make frivolous arguments on appeal. As a general rule, counsel may not make frivolous arguments. *See* Model R. of Prof'l Conduct r. 3.1 (Am. Bar Ass'n 1983); Restatement (Third) of the Law Governing Lawyers § 110(1). But lawyers' professional obligations "are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited." Model Rules of Prof'l Conduct r. 3.1, cmt. 3; *see also* Restatement (Third) of the Law Governing Lawyers § 110 cmt. f ("[A] lawyer representing a convicted person on appeal may be

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[2] The Supreme Court of Idaho has adopted its own version of the *Anders* process, requiring lawyers to brief their arguments on the merits without withdrawing. *See State v. McKenney*, 98 Idaho 551, 552 (1977).

required to file a so-called *Anders* brief in the event the lawyer concludes that there is no non-frivolous ground on which the appeal can be maintained."). In promulgating ethical rules governing the legal profession, the American Bar Association, like this Court, drew an important distinction between assisting a client on appeal—which is constitutionally required—and actively deceiving the court or opposing parties—which is prohibited. *See* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-9.2(e) (4th ed. 2015).

Requiring lawyers to abide by their clients' wishes and file notices of appeal serves a number of vital interests. Most importantly, these procedures preserve defendants' right to appeal. As this Court has noted, "a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Flores-Ortega*, 528 U.S. at 477. Without a rule ensuring that counsel file such a notice, a defendant may lose not only the right to a direct appeal, but also a lawyer in that appellate review. These procedures also improve the process by which appeals go forward. *Anders* briefs, for example, "provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeal to the best of their ability" and also "provide[] an independent inducement to counsel to perform a diligent review" of the case. *Penson v. Ohio*, 488 U.S. 75, 81-82, n.4 (1988) (quoting *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. at 439 (1988)).

This review by both counsel and the court is essential, even in the appeal waiver context. This is because this Court has held that many claims fall outside the scope of an appeal waiver, including whether the government breached the terms of the waiver, whether the plea or appeals waiver was knowing and voluntary, and whether the trial lawyer provided ineffective assistance of counsel.[3]

Regardless of any appeal waiver, the facts of this case raise several issues that could potentially have been raised on appeal. Counsel may have been able to argue that Mr. Garza did not knowingly waive his right to appeal, *see United States v. Mezzanatto*, 513 U.S. 196, 210 (1995), because Mr. Garza checked "no" to the question of whether he was waiving his right to appeal on a form that he filled out shortly before his plea. R at 97.[4] Similarly, during Mr. Garza's Rule 11 hearing, the District Court, though required to do so by state procedures, never inquired whether Mr. Garza understood that he was waiving his right to appeal, or what he meant when he checked "no" on his response form. *See* Idaho Crim. R. 11(d)(3); *see also* Fed. R. Crim. P. 11(b)(1)(N) (requiring the same). Indeed, the District Court explicitly told Mr. Garza: "[Y]ou have the right to appeal, and if you cannot afford an attorney, you can request to have one appointed at public expense." R. at 132. The court's two judgments also instructed Mr. Garza that he could appeal. *Id.* at 118, 121.

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[3] *Amicus* refers the Court to Petitioner's Brief, sec. B(1)(a), for additional amplification of this point.

[4] "R" refers to the record on appeal to the Idaho Supreme Court.

Of course, counsel's failure to file a notice of appeal prevented these potential claims from being reviewed. Instead, counsel offered only a "conclusory statement that the appeal was meritless." *See McCoy v. Court of Appeals of Wisconsin*, 486 U.S. at 443; *see also Smith v. Robbins*, 528 U.S. 259, 281 (2000) (noting that a "flaw with the procedures" in past cases "was that there was only one tier of review"). Counsel simply concluded that "Mr. Garza received the sentence(s) he bargained for," and told Mr. Garza that the "appeal was problematic because he waived his right to appeal" in his plea agreement, a partially untrue statement, which became unreviewable. Pet. App. at 52a.

C. The Client Retains Full Control Over the Decision to File a Notice of Appeal, Even if a Court Later Determines that an Argument Made on Appeal Breached the Plea Agreement.

Although lawyers advocate for their clients and advise them on strategy, clients are the masters of their own defense. As a result, criminal defendants' authority to decide whether to appeal is absolute. This principle is a reflection of the American legal tradition and finds particular resonance in the defendant's right to self-representation. *See Faretta v. California*, 422 U.S. 806, 819-20 (1975) ("The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.").

Moreover, defendants have the right to represent themselves, even though doing so often

increases the likelihood of an unfavorable outcome in their cases. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (stating that self-representation "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *see also Faretta*, 422 U.S. at 834 (1975) ("[A]lthough [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" (citing *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970))).

Mr. Garza did not lose his right to file a notice of appeal merely because the hypothetical arguments he might make on appeal could breach an existing plea agreement. To the extent that filing a notice of appeal puts the client's entire plea agreement at risk, that is a choice that the client—not the lawyer—is entitled to make.

This Court has recognized that a defendant chooses whether to honor or breach a plea agreement. For instance, in *Ricketts v. Adamson*, the defendant signed a plea agreement that required him to testify against his co-defendants at trial. 483 U.S. 1, 3 (1987). He did, but when his co-defendants had their convictions overturned and faced retrial, the defendant refused to testify, arguing that the plea agreement did not require him to do so. *Id.* at 4. This Court ultimately ruled against the defendant and found him in breach of his agreement, a breach whose consequences he had to accept because he made a "choice" to challenge the agreement, having "clearly appreciated and understood the consequences were

he found to be in breach of the agreement." *Id.* at 11-12.

The reasoning in *Ricketts* relies on a defendant's autonomy to make difficult decisions that impact his own defense. It would stand the rationale of *Ricketts* on its head to hold the defendant in *Ricketts* responsible for the consequences of his choice to risk breaching a plea agreement, while also depriving Mr. Garza of that same choice because he happened to have a disloyal lawyer who sabotaged his wishes.

Only a handful of exceptions allow lawyers to avoid carrying out their clients' instructions. Lawyers, not clients, have authority over decisions required by law or a court order, *see* Restatement (Third) of the Law Governing Lawyers § 23, and lawyers are not permitted to "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Model R. Prof'l Conduct r. 1.2(d). Neither exception applies here, where the decision to file an appeal is unequivocally granted to Mr. Garza, and filing a notice of appeal is not only permitted, but required. In all other matters, lawyers must consult with clients about "the means by which [a client's objectives] are to be pursued." Model R. Prof'l Conduct r. 1.2(a).

In this case, rules of professional responsibility would have required counsel to fully inform Mr. Garza of any risks pertaining to filing a notice of appeal. *See* Model R. Prof'l Conduct r. 2.1, cmt. 5 (A lawyer may have to offer advice "when a lawyer knows that a client proposes a course of action that is

likely to result in substantial adverse legal consequences to the client . . . ."). Obligatory ethical principles similarly required that Mr. Garza, the client, have the final say on whether to file a notice of appeal.

II. Counsel's Failure to File a Notice of Appeal, Over Mr. Garza's Express Wishes, Violated the Most Basic Principle of Agency Law and Is Presumptively Prejudicial.

A. A Lawyer Who Deliberately Disregards a Client's Instructions to File a Notice of Appeal Violates the Lawyer's Obligations of Loyalty by Disobeying the Client's Lawful Direction.

The relationship between a client and a lawyer is, at its core, "a quintessential principal-agent relationship." *Comm'r v. Banks*, 543 U.S. 426, 436 (2005). As is true of most principal-agent relationships, a defendant may rely on a lawyer's special skills and expertise to achieve a particular result. *See id.* Despite this reliance, a defendant retains "ultimate dominion and control over the underlying claim." *Id.*; *see also Faretta v. California*, 422 U.S. 806, 819-20 (1975) ("[The Sixth Amendment] speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."). A lawyer, as a client's agent, is obligated to act exclusively on behalf of and for the sole benefit of the client, the principal. *See Banks*, 543 U.S. at 436 (citing Restatement (Second) of Agency §§ 13, 39, 387 (Am. Law Inst.

2000)); *see also* Restatement (Third) of Agency § 8.09(2) (2006). A lawyer's failure to act within the bounds of that relationship thus runs afoul of not only Sixth Amendment jurisprudence, but also agency law.

Principles of agency law specify that a lawyer is bound to act in accordance with a defendant's wishes. The Restatement of Agency, for instance, provides that a lawyer has a duty to comply with all of a defendant's lawful instructions concerning the lawyer's actions taken on behalf of the defendant. *See* Restatement (Third) of Agency § 8.09(2) (2006). In particular, the very premise of a principal-agent relationship is that the agent's actions are consistent with the principal's manifestation of assent. *See id.* at cmt. b.

Any action taken by a lawyer over a defendant's objection "[has] the effect of revoking the agency with respect to the action in question." *Gonzalez v. United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring in judgment); *see also McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) ("Presented with express statements of the client's will . . . counsel may not steer the ship the other way."). Therefore, when a lawyer acts outside the bounds of the attorney-client relationship by undermining a client's decision, that lawyer can no longer be considered the defendant's agent.

Even though Mr. Garza expressly instructed counsel to file a notice of appeal in numerous phone calls and letters, counsel failed to do so. Pet. App. At 3a. Instead, counsel pursued a strategy that was fundamentally incompatible with Mr. Garza's express

wishes. Because Mr. Garza's decision was not only lawful, but also constitutionally protected, counsel, as Mr. Garza's agent, had a duty to obey. But in overriding Mr. Garza's lawful and constitutionally protected decision, counsel defied his client and no longer served as Mr. Garza's agent. Counsel not only violated a fundamental tenet of the attorney-client relationship, he also completely deprived Mr. Garza of a direct appeal represented by counsel.

B. Counsel's Decision Not to File a Notice of Appeal Is Presumptively Prejudicial Because It Forfeited Mr. Garza's Right to an Entire Judicial Proceeding.

When a lawyer's constitutionally deficient performance causes the forfeiture of "an entire judicial proceeding," the lawyer's conduct mandates a presumption of prejudice. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). The denial of an appellate proceeding is per se prejudicial because courts can afford no "presumption of reliability" to proceedings that never occurred. *Id.* (citing *Smith v. Robbins*, 528 U.S. 259, 286 (2000)).

Additionally, in these cases, a defendant need neither show actual prejudice by "specify[ing] the points he would raise were his right to appeal reinstated," nor demonstrate the likelihood of success on appeal. *Rodriquez v. United States*, 395 U.S. 327, 330 (1969); *see also Flores-Ortega*, 528 U.S. at 485. As this Court observed in *Rodriquez*, "[t]hose whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be

given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." 395 U.S. at 330. Here, Mr. Garza's situation is right on point: counsel's decision to override Mr. Garza's instructions to file an appeal robbed Mr. Garza of an entire judicial proceeding. Therefore, counsel's failure to file an appeal on behalf of Mr. Garza is presumptively prejudicial.

The policy rationale underlying *Flores-Ortega*'s and *Rodriquez*'s mandate requiring that courts presume prejudice is even more salient today, when over 97 percent of federal and 94 percent of state cases are resolved with plea agreements and their often concomitant appellate waivers. *See* Glenn R. Schmitt et al., *Overview of Federal Criminal Cases: Fiscal Year 2017*, United States Sentencing Commission 1, 5 (June 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf; *Felony Sentences*, Bureau of Justice Statistics (2006), https://www.bjs.gov/index.cfm?ty=tp&tid=233#pubs; Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 Fordham L. Rev. 2011, 2029 (2000); Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L. Q. 127, 128-29 (1995). For instance, one study found that in nearly two-thirds of federal cases settled by plea agreement, the defendant waived the right to an appeal. *See* Nancy J. King & Michael E. O'Neil, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005).

Counsel's decision to blatantly defy Mr. Garza's constitutionally protected choice deprived him of a lawyer. In both *Maples v. Thomas*, 565 U.S. 266 (2012), and *Holland v. Florida*, 560 U.S. 631 (2010), this Court relied on agency law to make a salient point that is also relevant here: a client "cannot be charged with the acts or omissions of an attorney who has abandoned him." *Maples*, 565 U.S. at 283. This is because after a lawyer severs the principal-agent relationship, a lawyer "no longer acts, or fails to act, as the client's representative." *Id.* at 281 (citing Restatement (Third) of Law Governing Lawyers § 31, cmt. f (1998)); *see also id.* at 284 (citing Restatement (Second) of Agency §§ 112, 394 cmt. a (1957)). In essence, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland*, 560 U.S. at 659 (Alito, J., concurring in judgment); *see also Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991). *Maples* and *Holland* involved lawyers who, by completely disregarding their clients' decisions, did not operate as the clients' agents at all.

In this case, by failing to file a notice of appeal, counsel similarly severed the principal-agent relationship between Mr. Garza and himself, thus leaving Mr. Garza with no lawyer and no ability to file his own notice of appeal. Counsel here deliberately ignored Mr. Garza's repeated, lawful instructions. By blatantly disobeying his client's direction to file a notice of appeal, counsel removed himself as Mr. Garza's agent. Counsel's obvious, avoidable, and serious error demands a presumption of prejudice.

III. The Court Should Establish a Clear Rule that Prevents Lawyers from Sacrificing a Client's Clearly Expressed Desire to a Constitutional Right.

A. Lawyers Need a Clear Rule to Understand Their Obligation to Their Clients to File a Notice of Appeal.

Both the states and the federal government typically impose short time periods within which to file a notice of appeal in a criminal case. For example, this window is forty-two days in Idaho and fourteen days in federal court. *See* Idaho App. R. 14; Fed. R. App. P. 4. This makes the filing of a notice of appeal a ministerial act, which protects the client's right after notice is filed to sufficiently consider the merits of a direct appeal.

Once an appeal is noticed, appellate lawyers are ethically required to make a serious evaluation of the merits of their clients' appeal. The American Bar Association has recognized that "a defendant is entitled to more than merely a reflexive or negative reaction to the supposed errors that the convicted defendant thinks are present in the case." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3 cmt. (3d ed. 1993).[5] More specifically, the ABA has advised that

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[5] Although the ABA released the Fourth Edition of the ABA Standards for Criminal Justice Prosecution Function and Defense Function in 2015, it has not yet published or adopted the associated comments. Therefore, this brief refers to the Third Edition when citing to comments to this publication.

"[d]efense counsel should consider engaging or consulting with an expert in criminal appeals in order to determine issues related to making a decision to appeal." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 9.1(b) (4th ed. 2015). Further, considering whether there are non-frivolous grounds for appeal is more complicated than simply reviewing the four corners of the record of conviction.

The ABA contemplates two primary categories of appellate issues for which this is true. First, and of particular relevance where a client has entered a guilty plea, the lawyer should "take up, evaluate, and pursue any question that might affect the validity of the judgment of conviction and sentence." *Id.* Second, "in some instances, even when the existing doctrine does not support a case for reversal on appeal, there may be a sound basis for arguing for an extension, modification, or reversal of existing law." *Id.* A lawyer's careful consideration of whether there is a legitimate basis for a client's desired appeal is particularly critical because most issues are forfeited if they are not raised on direct appeal. *See* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-3.6 cmt. (3d ed. 1993). In light of the ramifications of forfeiting a client's appeal right, a client who has explicitly expressed a desire to file a notice of appeal certainly deserves a more thorough consideration of these questions.

The trial lawyer who believes that a client has no non-frivolous grounds for appeal must file a notice of appeal to protect his client's right to a consideration

of the merits. In Idaho, as in many other states, a trial lawyer who represents an indigent defendant is required to continue to represent that person after the trial or plea bargain, short of a showing of good cause for withdrawal before filing the notice of appeal. *See* Idaho App. R. 45.1(b).

The ABA Standards for Criminal Justice Defense Function recognize this friction explicitly and state, "[t]o make the right to counsel meaningful, representation must be continuous throughout the criminal process." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.2 cmt. (3d ed. 1993). As a result, trial counsel who will not represent a client on appeal has a special obligation to protect that client's appeal right, and thus may have to file the notice. *Id.* Alternatively, the client could represent himself in the appellate proceedings, but would only be able to file a notice of appeal pro se if not represented by counsel. Therefore, here as well trial counsel would have to withdraw, the court would have to permit the defendant to proceed without a lawyer, and the defendant would have to learn the mechanics of filing a notice of appeal on his own. This Court should not require defendants to go to such terrific lengths, because "a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

There is no merit to the argument that requiring lawyers to file notices of appeal when requested by their clients will force them to make frivolous arguments on appeal. First, appellate

counsel very often differs from trial counsel. As a result, the fact that a client's trial lawyer files a notice of appeal does not mean that the trial lawyer will also file the appellate brief in the case. Second, appellate lawyers may not decline to file an appellate brief—they are instead required to file a brief under *Anders v. California* when they believe there are no non-frivolous grounds for appeal. 386 U.S. 738, 744-45 (1967). Finally, lawyers who file notices of appeal on their clients' behalf, but ultimately decide there are no non-frivolous grounds on which to appeal, may "seek to persuade the defendant to withdraw the appeal." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3 cmt. (3d ed. 1993).

There is a substantial risk of overlooking meritorious grounds for appeal when a lawyer has a short period to review a client's case. This brief window also affords neither lawyers nor clients time to complete the withdrawal process so that the client or a new lawyer may file such a notice of appeal instead. The ministerial function of filing a notice of appeal does not in any way resemble the task of making arguments on appeal. Thus, were this Court to permit lawyers to refuse to file an appeal, it would be depriving defendants of their constitutional right to a thorough review of the merits on appeal.

B. If This Court Does Not Presume Prejudice Here, Defendants Will Have No Choice but to Proceed Pro Se to Demonstrate Prejudice Because They Had Constitutionally Deficient Trial Counsel Who Failed to Obey Them.

It is fundamentally unfair to require defendants to proceed pro se to demonstrate prejudice simply because they had constitutionally deficient trial counsel. This Court held that every individual, regardless of wealth, has a constitutional right to access appellate counsel with whom to consult, review the record, and litigate issues on appeal. *See Douglas v. California*, 372 U.S. 353, 356 (1963). However, there is no such right in post-conviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). As a result, if this Court does not presume prejudice where a lawyer ignores a client's instructions and refuses to file a notice of appeal because the client's plea contained an appeal waiver, the client will have to demonstrate that the lawyer's constitutional deficiency resulted in actual prejudice. By virtue of being appointed a constitutionally deficient trial lawyer who ignored express instructions, the client will be deprived of the benefit of a constitutionally competent lawyer on appeal.

It is manifestly unjust to saddle those who have been deserted by counsel with the burden of showing they were prejudiced by lawyers who defied their exclusive right to direct the filing of a notice of appeal. Those who suffer from this defective counsel will be disproportionately indigent defendants, who are often

represented by lawyers with much higher case-loads than private lawyers. *See* Vida B. Johnson, *A Plea for Funds: Using* Padilla, Lafler, *and* Frye *to Increase Public Defender Resources*, 51 Am. Crim. L. Rev. 403, 423-26 (2014). The poor, who are already overrepresented in the criminal justice system, will also be unable to hire a lawyer for their post-conviction proceedings and, thus, will be obligated to proceed pro se. Like under California's system before *Douglas* was decided—where appellate counsel was denied to those whose cases were deemed non-meritorious by a district court—"the discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot." *Douglas*, 372 U.S. at 357.

This Court has held that "[w]hen an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." *Id.* Where a defendant has already entered a guilty plea, one issue that cannot be waived is whether the plea was made knowingly, voluntarily, and competently. *See United States v. Mezzanatto*, 513 U.S. 196 (1995).

An appeal on these bases is more complex than other appellate issues in two primary ways. The first is that these may occur where a client has a diminished capacity, and thus will have a particularly difficult time representing himself. Those with mental health challenges are overrepresented in the criminal justice system. *See Criminal Justice / Mental Health Consensus Project*,

Council of State Governments (June 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/197103.pdf. In fact, Mr. Garza specifically indicated on his guilty plea form that he himself suffers from mental illness. *See* R. at 95, 107. Second, many claims that a plea was not knowing, intelligent, and voluntary arise from the ineffective assistance of counsel. It is both unfair and nonsensical to make a defendant's ability to press such claims dependent on the very lawyer who may have acted ineffectively. To ask a defendant who is unrepresented to independently demonstrate that these issues were present at trial, and that trial counsel prejudiced the outcome of the case, is to punish the defendant for the constitutional failings of his lawyer.

Finally, a lawyer who refuses to file a notice of appeal for a client also unfairly deprives that client of the constitutional right to appellate counsel. As discussed *infra* in Section III.a, there is only a short window during which a notice of appeal can be filed. A lawyer who independently decides not to file such a notice and runs out the clock on that period deprives a defendant of the right to an appellate counsel who might have found meritorious grounds for appeal as guaranteed in *Douglas*. The lawyer also prevents the client from exercising the right to self-representation on appeal. *See Faretta v. California*, 422 U.S. 806 (1975).

Were the Court not to presume prejudice where lawyers override their clients' decisions to appeal their cases, criminal defendants will bear the unfair burden of having to demonstrate prejudice pro se. Additionally, defendants will be denied access to

appellate counsel who might find meritorious arguments where trial counsel (looking at his or her own conduct) found none. These burdens will fall disproportionately on the poor, reopening the door to the type of invidious discrimination in appellate proceedings this Court has worked to stamp out for more than half a century.

CONCLUSION

This case raises the most fundamental of constitutional issues at the intersection of the right to counsel and a lawyer's ethical obligations. Quite simply, Mr. Garza and criminal defendants similarly situated are entitled to have any appeal they wish to file be noticed in a timely way, even if the notice follows a guilty plea by the client. Failure by counsel to file such a notice is an error of constitutional dimensions.

For these reasons, the Idaho Supreme Court's judgment should be reversed.

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No. 17-1026

IN THE
Supreme Court of the United States

GILBERTO GARZA, JR.,
Petitioner,

v.

STATE OF IDAHO,
Respondent.

On Writ of Certiorari to the Supreme Court of Idaho

BRIEF OF THE IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the "presumption of prejudice" recognized in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

TABLE OF CONTENTS

	Page
Interest of *Amici Curiae*	1
Summary of Argument	3
Argument	5
I. A Presumption of Prejudice Is Appropriate Because Defendants Often Succeed on Appeal Despite Waivers	5
A. Defendants Often Succeed on Appeal Based on Issues Beyond the Scope of Their Particular Waivers	6
B. Defendants Often Succeed on Appeal Even on Claims Within the Scope of a Waiver	11
C. The Decision Below Ignores the Potential for Meritorious Claims Even in Cases Involving Appeal Waivers	20
II. Postconviction Proceedings Are Not an Adequate Substitute for Direct Appellate Review	22
A. Claims That Are Not Raised on Direct Appeal Generally Cannot Be Raised in Postconviction Proceedings	23
B. Higher Pleading Standards Apply in Postconviction Proceedings	24
C. There Is No Constitutional Right to Counsel in Postconviction Proceedings	26
Conclusion	27

TABLE OF AUTHORITIES

Page(s)

CASES

Cal. Pac. Bank v. *FDIC*,
885 F.3d 560 (9th Cir. 2018) 25

Campbell v. *United States*,
686 F.3d 353 (6th Cir. 2012) 5

Campusano v. *United States*,
442 F.3d 770 (2d Cir. 2006) 5

Coleman v. *Thompson*,
501 U.S. 722 (1991) 26

Ex parte De Leon,
400 S.W.3d 83 (Tex. Crim. App. 2013) 15

Evitts v. *Lucey*, 469 U.S. 387 (1985) 26

Fields v. *State*, 155 Idaho 532 (2013) 24

Gonzales v. *State*,
151 Idaho 168 (Ct. App. 2011) 26

Hughes v. *State*,
148 Idaho 448 (Ct. App. 2009) 23

Hurlow v. *United States*,
726 F.3d 958 (7th Cir. 2013) 12

Judd v. *State*,
148 Idaho 22 (Ct. App. 2009) 26

Martinez v. *United States*,
No. 05-cr-123-12, 2008 WL 4889665
(E.D. Pa. Nov. 12, 2008) 22

Massaro v. *United States*,
538 U.S. 500 (2003) 23

Mathis v. *United States*,
No. 7:09-cr-139-1BO, 2012 WL 1156438
(E.D.N.C. Apr. 6, 2012) 18

Melton v. *State*, 148 Idaho 339 (2009) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Murphy v. *State*,
143 Idaho 139 (Ct. App. 2006) 25

Murphy v. *State*, 156 Idaho 389 (2014) 26

Nelson v. *State*,
157 Idaho 847 (Ct. App. 2014) 26

Nuñez v. *United States*,
546 F.3d 450 (7th Cir. 2008) 20

Pentico v. *State*,
159 Idaho 350 (Ct. App. 2015) 24

People v. *Smith*,
143 A.D.3d 31 (1st Dep't 2016), aff'd,
30 N.Y.3d 626 (2017) 15

Reynolds v. *United States*,
No. 12-12-RGA, 2014 WL 6983354
(D. Del. Dec. 9, 2014) 22

Roe v. *Flores-Ortega*,
528 U.S. 470 (2000) ..... *passim*

In re Sealed Case,
702 F.3d 59 (D.C. Cir. 2012) 10, 13

Self v. *State*,
145 Idaho 578 (Ct. App. 2007) 25

Small v. *State*,
132 Idaho 327 (Ct. App. 1998) 25

Solano v. *United States*,
812 F.3d 573 (7th Cir. 2016) 22

State v. *Colyer*, 98 Idaho 32 (1976) 23

State v. *Cope*, 142 Idaho 492 (2006) 23

State v. *Hansen*, 156 Idaho 169 (2014) 11

State v. *Hernandez*,
121 Idaho 114 (Ct. App. 1991) 23

TABLE OF AUTHORITIES—Continued

Page(s)

State v. *Holdaway*, 130 Idaho 482 (1997) 11

State v. *Payne*, 146 Idaho 548 (2008) 24

State v. *Rendon*,
No. 38275, 2012 WL 9492805
(Idaho Ct. App. May 11, 2012)..... 19

State v. *Rodriguez*,
No. 45233, 2018 WL 700168
(Idaho Ct. App. Feb. 5, 2018) 19

State v. *Straub*, 153 Idaho 882 (2013)..... 10

State v. *Wicklund*,
No. 38697, 2011 WL 11067224
(Idaho Ct. App. Dec. 29, 2011)..... 11

State v. *Zichko*, 129 Idaho 259 (1996)..... 25

United States v. *Adams*,
814 F.3d 178 (4th Cir. 2016)..... 17, 18

United States v. *Almonte-Nuñez*,
771 F.3d 84 (1st Cir. 2014) 15, 16

United States v. *Andis*,
333 F.3d 886 (8th Cir. 2003)..... 12

United States v. *Aquino-De La Rosa*,
139 F. App'x 298 (1st Cir. 2005) 14

United States v. *Atkinson*,
354 F. App'x 250 (6th Cir. 2009)..... 15

United States v. *Attar*,
38 F.3d 727 (4th Cir. 1994)..... 12

United States v. *Benson*,
553 F. App'x 660 (8th Cir. 2014)..... 10

United States v. *Booker*,
543 U.S. 220 (2005)..... 14, 20

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Castro*,
704 F.3d 125 (3d Cir. 2013) 18, 19

United States v. *Chapa*,
602 F.3d 865 (7th Cir. 2010) 6

United States v. *Chem. & Metal Indus., Inc.*,
677 F.3d 750 (5th Cir. 2012) 10

United States v. *Cheney*,
571 F.3d 764 (8th Cir. 2009) 19

United States v. *Cooley*,
590 F.3d 293 (5th Cir. 2009) 15

United States v. *Davis*,
689 F.3d 349 (4th Cir. 2012) 6

United States v. *Dawson*,
587 F.3d 640 (4th Cir. 2009) 16

United States v. *Doss*,
No. 1:12-cr-326, 2017 WL 1709397
(M.D. Pa. May 3, 2017) 21

United States v. *Droganes*,
728 F.3d 580 (6th Cir. 2013) 6

United States v. *Dunlap*,
No. 10-190, 2010 WL 4614557
(W.D. Pa. Nov. 5, 2010) 21

United States v. *Egwuekwe*,
No. 1:14-cr-6, 2017 WL 5009100
(M.D. Pa. Nov. 2, 2017) 21

United States v. *Gonzalez-Lopez*,
548 U.S. 140 (2006) 21

United States v. *Grimes*,
739 F.3d 125 (3d Cir. 2014) 6

TABLE OF AUTHORITIES—Continued

Page(s)

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561 F.3d 527 (D.C. Cir. 2009) 12

United States v. *Hahn*,
359 F.3d 1315 (10th Cir. 2004)..... 12

United States v. *Hardman*,
778 F.3d 896 (11th Cir. 2014)..... 6, 12

United States v. *Hartshorn*,
163 F. App'x 325 (5th Cir. 2006)..... 11

United States v. *Henderson*,
72 F.3d 463 (5th Cir. 1995)..... 12

United States v. *Hernandez*,
242 F.3d 110 (2d Cir. 2001) 12

United States v. *Hull*,
No. 16 C 2096, 2017 WL 6733689
(N.D. Ill. Dec. 19, 2017) 22

United States v. *Hunt*,
843 F.3d 1022 (D.C. Cir. 2016) 6, 11

United States v. *Jacobson*,
15 F.3d 19 (2d Cir. 1994) 11

United States v. *Joiner*,
183 F.3d 635 (7th Cir. 1999)..... 12

United States v. *Jones*,
667 F.3d 477 (4th Cir. 2012)..... 19

United States v. *Khattak*,
273 F.3d 557 (3d Cir. 2001) 12, 13

United States v. *Lonjose*,
663 F.3d 1292 (10th Cir. 2011)..... 6

United States v. *Lovelace*,
565 F.3d 1080 (8th Cir. 2009)..... 16

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Mabry*,
536 F.3d 231 (3d Cir. 2008) 12, 20, 21

United States v. *Obak*,
884 F.3d 934 (9th Cir. 2018)..... 19

United States v. *Oladimeji*,
463 F.3d 152 (2d Cir. 2006) 6, 10

United States v. *Olson*,
880 F.3d 873 (7th Cir. 2018)..... 13

United States v. *Ortega-Hernandez*,
804 F.3d 447 (D.C. Cir. 2015) 19

United States v. *Palmer*,
456 F.3d 484 (5th Cir. 2006)..... 7

United States v. *Parenteau*,
506 F. App'x 430 (6th Cir. 2012)..... 11

United States v. *Pease*,
240 F.3d 938 (11th Cir. 2001)..... 10

United States v. *Pena*,
314 F.3d 1152 (9th Cir. 2003)..... 15

United States v. *Portillo-Cano*,
192 F.3d 1246 (9th Cir. 1999)..... 15

United States v. *Preston*,
598 F. App'x 465 (8th Cir. 2015)..... 11

United States v. *Quirindongo-Collazo*,
213 F. App'x 10 (1st Cir. 2007) 14

United States v. *Rodriguez-Perez*,
184 F. App'x 451 (5th Cir. 2006)..... 15

United States v. *Santiago-Burgos*,
750 F.3d 19 (1st Cir. 2014) 6

United States v. *Scallon*,
683 F.3d 680 (5th Cir. 2012)..... 6, 15

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Schulte*,
436 F.3d 849 (8th Cir. 2006) 10

United States v. *Selvy*,
619 F.3d 945 (8th Cir. 2010) 6

United States v. *Sistrunk*,
432 F.3d 917 (8th Cir. 2006) 10

United States v. *Speelman*,
431 F.3d 1226 (9th Cir. 2005) 6

United States v. *Spruill*,
292 F.3d 207 (5th Cir. 2002) 13, 15

United States v. *Story*,
439 F.3d 226 (5th Cir. 2006) 20

United States v. *Suarez*,
879 F.3d 626 (5th Cir. 2018) 25

United States v. *Teeter*,
257 F.3d 14 (1st Cir. 2001) 12, 13

United States v. *Velazquez*,
855 F.3d 1021 (9th Cir. 2017) 14

United States v. *Waupoose*,
394 F. App'x 320 (7th Cir. 2010) 10

United States v. *Wingo*,
789 F.3d 1226 (11th Cir. 2015) 13, 14

United States v. *Woltmann*,
610 F.3d 37 (2d Cir. 2010) 17

United States v. *Zink*,
107 F.3d 716 (9th Cir. 1997) 10

Washington v. *Lampert*,
422 F.3d 864 (9th Cir. 2005) 12

Watson v. *United States*,
493 F.3d 960 (8th Cir. 2007) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Workman v. *State*,
144 Idaho 518 (2007) 24, 26

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. VIII 9

18 U.S.C. § 3553(a) 17

28 U.S.C. § 2255 ..... 10, 18

Idaho Code § 19-4901(b) 23

Idaho Code § 19-4903 24

Fed. R. App. P. 28(a)(8) 25

Fed. R. Crim. P. 11(b)(3) 13

Idaho App. R. 35(a)(4) 25

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https://www.idoc.idaho.gov/
content/prisons/death_row 26

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Supervised Population Snapshot,
https://dash.idoc.idaho.gov/ 26

Plea Agreement,
United States v. *Baxter*,
No. 3:10-cr-00074
(M.D. Tenn. filed Feb. 15, 2013), Dkt. 43..... 9

Plea Agreement,
United States v. *Brooks*,
No. 1:14-cr-00209-TWP-TAB
(S.D. Ind. filed July 28, 2015), Dkt. 139 9

TABLE OF AUTHORITIES—Continued

Page(s)

Plea Agreement,
United States v. *Campbell*,
No. 4:16-mj-03179-JR
(D. Ariz. filed Aug. 31, 2016), Dkt. 27 8

Plea Agreement,
United States v. *Cervantes*,
No. 5:09-cr-00011-VAP
(C.D. Cal. filed Mar. 31, 2010), Dkt. 127 9

Plea Agreement,
United States v. *Daniels*,
No. 3:11-cr-00008-WKW-CSC
(M.D. Ala. filed Feb. 16, 2012), Dkt. 203..... 7

Plea Agreement,
United States v. *Flanders*,
No. 2:12-cr-00363-TLN-EFB
(E.D. Cal. filed Feb. 2, 2015), Dkt. 59 8

Plea Agreement,
United States v. *Fortuna*,
No. 1:12-cr-00636-NLH
(D.N.J. filed Aug. 15, 2013), Dkt. 109..... 8

Plea Agreement,
United States v. *Irish*,
No. 1:13-cr-00142-PB
(D.N.H. filed Dec. 11, 2014), Dkt. 102..... 8

Plea Agreement,
United States v. *Lopez*,
No. 1:04-cr-00209-LY-1
(W.D. Tex. filed Sept. 20, 2004), Dkt. 73-2..... 7

Plea Agreement,
United States v. *Mangels*,
No. 9:16-cr-00006-DLC
(D. Mont. filed June 13, 2016), Dkt. 50..... 10

TABLE OF AUTHORITIES—Continued

Page(s)

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United States v. *Martinez*,
No. 8:04-cr-00567-EAK-TGW
(M.D. Fla. filed Oct. 17, 2005), Dkt. 67 8

Plea Agreement,
United States v. *Montgomery*,
No. 1:13-cr-00273-CG-C-1
(S.D. Ala. filed Feb. 7, 2014), Dkt. 17 8

Plea Agreement,
United States v. *Newton*,
No. 1:13-cr-00094-LPS-1
(D. Del. filed Sept. 19, 2013), Dkt. 48 8

Plea Agreement,
United States v. *Stolkner*,
No. 2:15-cr-00143-JDL
(D. Maine filed Mar. 29, 2016), Dkt. 116 8

Plea Agreement,
United States v. *Torres*,
No. 2:12-cr-00154-KJD-GWF-1
(D. Nev. filed Dec. 31, 2013), Dkt. 60 9

Plea Agreement,
United States v. *Wong*,
No. 4:11-cr-427-PJH-1
(N.D. Cal. filed Jan. 12, 2017), Dkt. 43 9

Susan R. Klein, *et al.*,
Waiving the Criminal Justice System,
52 Am. Crim. L. Rev. 73 (2015) 5

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INTEREST OF *AMICI CURIAE*[1]

Established in 1989, the Idaho Association of Criminal Defense Lawyers ("IACDL") is a nonprofit, voluntary organization of attorneys. Currently, IACDL has over

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[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than *amicus*, its members, and its counsel made such a contribution. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

400 lawyer members, all of whom practice criminal defense. IACDL's membership includes both public defenders and private counsel, attorneys who work in both state and federal courts, and attorneys who focus on trials, appeals, postconviction, and federal habeas proceedings. One of IACDL's primary goals is to improve the quality of representation provided to criminal defendants in Idaho, especially for those who cannot afford to retain counsel. For those reasons, IACDL has a strong commitment to ensuring that Idaho defendants receive adequate assistance of counsel at trial and that they are fully able to effectuate their rights to appeal.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary professional bar association that works on behalf of criminal defense attorneys and strives to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members—up to 40,000, counting affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

Given the size and breadth of IACDL's and NACDL's memberships, the organizations have substantial practical expertise regarding how defense attorneys, their clients, and courts operate. IACDL and NACDL likewise have insight into how each of those actors deals with the issues implicated by this case, *i.e.*, the scope and validity of plea agreements and appeal waivers, and ineffective assistance of counsel claims.

SUMMARY OF ARGUMENT

This case arises from counsel's failure to file notices of appeal against the client's instructions in two different cases. In 2015, Mr. Garza signed guilty pleas containing waivers of his rights to appeal. Pet. App. 44a ¶7, 49a ¶6. But the trial court "advised Garza of his appeal rights anyway." *Id.* at 3a. After sentencing, Mr. Garza asked his trial counsel to file notices of appeal. See *ibid.* Counsel refused. See *ibid.*

Mr. Garza then filed petitions for postconviction relief, arguing, among other things, that his plea was involuntary and that his counsel was ineffective for failing to file notices of appeal. Pet. App. 29a-30a. The Idaho Supreme Court affirmed dismissal of the petitions, holding that Mr. Garza could not show ineffective assistance of counsel because he could not prove any prejudice from his counsel's failure to follow instructions. See *id.* at 38a-39a. That decision was wrong: Mr. Garza was entitled to a presumption of prejudice, a presumption that is appropriate in this case notwithstanding the presence of an appeal waiver.

I. An attorney's failure to file a notice of appeal badly disadvantages a defendant. As this Court held in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), that failure "demands a presumption of prejudice" because it results in the "forfeiture of a proceeding." *Id.* at 483. That remains true even where a defendant has agreed to an appeal waiver.

Appeal waivers vary dramatically in form and scope. Thus, defendants will often have viable appellate claims despite appeal waivers, simply because the claims fall outside the scope of the waiver. Moreover, one thing that all waivers have in common is that they allow defendants

to pursue at least some claims on appeal. No waiver categorically bars every type of appeal.

Given those facts, it is no surprise that defendants have often succeeded on appeal despite waivers. In some cases, defendants have prevailed on arguments that fall beyond the scope of their particular waivers. In others, they have succeeded in challenging their convictions and sentences despite even the broadest waivers, based on the involuntariness of the plea, the inadequate factual basis for the plea, or breach of the plea agreement by the government—to name only a few bases for relief.

There is thus no reason to deviate from the presumption of prejudice that applies under *Flores-Ortega* simply because the plea agreement contains a waiver. Defendants whose counsel refuse to file a notice of appeal suffer the same fate whether or not they have agreed to a waiver: They forfeit their direct appeals—appeals that may well have been successful despite the waiver. The same presumption of prejudice should therefore apply in both circumstances.

II. Although a defendant wrongfully denied an appeal could still attempt to pursue certain claims on collateral review, that review is an inadequate substitute for a direct appeal. Issues generally may not be raised for the first time in postconviction proceedings. As a result, a defendant whose attorney failed to file a notice of appeal may never have an opportunity to raise certain claims.

Even if a defendant can raise a claim in postconviction proceedings, the defendant will typically have to do so under heightened pleading standards. And the defendant will also normally have to do so without the benefit of counsel. Those obstacles create an intolerable risk that defendants who involuntarily signed guilty pleas will end up in prison.

The judgment below should be reversed.

ARGUMENT

I. A Presumption Of Prejudice Is Appropriate Because Defendants Often Succeed On Appeal Despite Waivers

This Court held in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), that prejudice should be presumed where counsel fails to notice an appeal against the client's instructions because that failure results in the "forfeiture of a proceeding." *Id.* at 483. An appeal waiver does not provide a sufficient reason to deviate from that presumption.

Appeal waivers differ dramatically in form and content across jurisdictions. See Susan R. Klein, *et al.*, *Waiving the Criminal Justice System*, 52 Am. Crim. L. Rev. 73, 122-126 (2015) (collecting examples). Some waivers apply only to direct appeals, some waive only certain errors in sentencing or trial, some permit appeals on all issues with certain exceptions, and some expressly permit defendants to bring certain substantive claims. Even the broadest waivers may be successfully challenged on the ground that the plea was involuntary, among others. See *Campbell* v. *United States*, 686 F.3d 353, 358 (6th Cir. 2012) ("[W]aiver[s] of appeal rights can be challenged on various * * * grounds * * *."); *Watson* v. *United States*, 493 F.3d 960, 964 (8th Cir. 2007) (appeal waivers "d[o] not foreclose appeal altogether"); *Campusano* v. *United States*, 442 F.3d 770, 777 (2d Cir. 2006) (Sotomayor, J.) (appellate relief is "not inconceivable" even if defendant seems to have "sign[ed] away the right to appeal").

As a result, defendants who agree to waivers may still bring certain claims on appeal—including claims that fall outside the scope of the waiver or challenges to the validity of the plea. Examples abound of defendants who have succeeded on such claims.

An attorney's decision, over the client's express instructions, to forfeit the client's appeal can thus have profound effects. Regardless of an appeal waiver, forfeiting an appeal can be the difference between conviction or no conviction. Or it can affect the amount of time a person spends behind bars. A presumption of prejudice is necessary to ensure that defendants do not suffer the consequences of their attorneys' unilateral decisions not to notice their appeals.

A. Defendants Often Succeed on Appeal Based on Issues Beyond the Scope of Their Particular Waivers

Many appeal waivers do not even purport to bar all potentially available claims. Often, waivers are written or interpreted to bar only certain claims, leaving others available for appellate review. The federal courts of appeals unanimously agree that "[a] valid and enforceable appeal waiver * * * only precludes challenges that fall within its scope." *United States* v. *Hardman*, 778 F.3d 896, 899 & n.2 (11th Cir. 2014) ("All eleven * * * circuits with criminal jurisdiction agree * * *.").[2] Thus, even in

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[2] See also *United States* v. *Santiago-Burgos*, 750 F.3d 19, 22-23 (1st Cir. 2014) (similar); *United States* v. *Grimes*, 739 F.3d 125, 128-129 (3d Cir. 2014) (similar); *United States* v. *Droganes*, 728 F.3d 580, 586 (6th Cir. 2013) (similar); *United States* v. *Davis*, 689 F.3d 349, 354-355 (4th Cir. 2012) (similar); *United States* v. *Scallon*, 683 F.3d 680, 682 (5th Cir. 2012) (similar); *United States* v. *Lonjose*, 663 F.3d 1292, 1297 (10th Cir. 2011) (similar); *United States* v. *Chapa*, 602 F.3d 865, 868 (7th Cir. 2010) (similar); *United States* v. *Selvy*, 619 F.3d 945, 950-951 (8th Cir. 2010) (similar); *United States* v. *Speelman*, 431 F.3d 1226, 1229 (9th Cir. 2005) (similar); see, *e.g.*, *United States* v. *Hunt*, 843 F.3d 1022, 1027 (D.C. Cir. 2016) (permitting appeal because waiver did not "unambiguously foreclose [defendant's] challenges"); *United States* v. *Oladimeji*, 463 F.3d 152, 156 (2d Cir. 2006) (determining whether challenge "fall[s] within the scope of [defendant's] appeal waiver").

cases involving appeal waivers, defendants will often have potentially meritorious appellate claims based on issues beyond the scope of the waiver. That prospect alone forecloses any argument that a presumption of prejudice is inappropriate for cases involving appeal waivers.

1. The variations in the scope of appeal waivers are almost infinite. Certain waivers, for example, apply only to challenges to the defendant's sentence, not to the underlying conviction. See, *e.g.*, Plea Agreement ¶7, *United States* v. *Lopez*, No. 1:04-cr-00209-LY-1 (W.D. Tex. filed Sept. 20, 2004), Dkt. 73-2 ("Defendant expressly waives the right to appeal *his sentence* on any ground * * *." (emphasis added)). Those waivers necessarily leave open broad grounds for appeal.

In *United States* v. *Palmer*, 456 F.3d 484 (5th Cir. 2006), for example, the defendant signed an appeal waiver that barred appeals of the "sentence imposed" but did not expressly mention direct appeals from his conviction. *Id.* at 486-487. The defendant sought to appeal his conviction on the ground that there was no adequate factual basis for his guilty plea. *Id.* at 489. The court allowed the appeal, holding that "the language barring a sentencing appeal" did not "bar[ ] appeal of a conviction." *Id.* at 488. "A defendant's waiver of his right to appeal a sentence is just that," the court explained—"it does not also constitute a waiver of his right to challenge a conviction." *Ibid.* The court ultimately vacated one count, finding that the plea was "based on facts precluding conviction." *Id.* at 492.

2. Some waivers expressly allow defendants to bring certain specific substantive claims on direct appeal. Claims of prosecutorial misconduct, for example, are often expressly carved out. See, *e.g.*, Plea Agreement at 9-

10, *United States* v. *Daniels*, No. 3:11-cr-00008-WKW-CSC (M.D. Ala. filed Feb. 16, 2012), Dkt. 203 (waiver covering "any and all rights" to appeal except "the right to appeal on the ground of * * * prosecutorial misconduct"); Plea Agreement ¶9, *United States* v. *Campbell*, No. 4:16-mj-03179-JR (D. Ariz. filed Aug. 31, 2016), Dkt. 27 (similar). So are challenges based on newly discovered evidence or changes in law. See, *e.g.*, Plea Agreement ¶4, *United States* v. *Stolkner*, No. 2:15-cr-00143-JDL (D. Maine filed Mar. 29, 2016), Dkt. 116 ("waiver * * * shall not apply to appeals based on a right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"); Plea Agreement ¶13, *United States* v. *Irish*, No. 1:13-cr-00142-PB (D.N.H. filed Dec. 11, 2014), Dkt. 102 (similar).

Other waivers permit defendants to raise certain errors relating to their sentencing proceedings. Many permit defendants to appeal if the sentence exceeds the applicable guidelines range. See, *e.g.*, Plea Agreement ¶15, *United States* v. *Newton*, No. 1:13-cr-00094-LPS-1 (D. Del. filed Sept. 19, 2013), Dkt. 48. Others limit review to certain issues, such as "any right [the defendant] may have * * * to appeal the sentencing court's determination of the criminal history category." Plea Agreement at 11, *United States* v. *Fortuna*, No. 1:12-cr-00636-NLH (D.N.J. filed Aug. 15, 2013), Dkt. 109. Others permit an appeal if the sentence imposed exceeds the stipulated maximum. See, *e.g.*, Plea Agreement at 9-10, *United States* v. *Flanders*, No. 2:12-cr-00363-TLN-EFB (E.D. Cal. filed Feb. 2, 2015), Dkt. 59; Plea Agreement ¶24(a)(1)-(2), *United States* v. *Montgomery*, No. 1:13-cr-00273-CG-C-1 (S.D. Ala. filed Feb. 7, 2014), Dkt. 17 (similar); see also Plea Agreement at 11, *United States* v. *Martinez*, No. 8:04-cr-00567-EAK-TGW (M.D. Fla. filed

Oct. 17, 2005), Dkt. 67 (allowing challenges on "ground that the sentence violates the Eighth Amendment").

Other waivers preserve arguments relating to rulings on motions to suppress evidence. See, *e.g.*, Plea Agreement at 11, *United States* v. *Torres*, No. 2:12-cr-00154-KJD-GWF-1 (D. Nev. filed Dec. 31, 2013), Dkt. 60 (permitting appeal based on "the District Court's denial of [defendant's] motion to suppress" as to "the inventory search of [defendant's] vehicle"). Or they preserve the defendant's "ability to appeal [certain] conditions of supervised release." See, *e.g.*, Plea Agreement at 10-11, *United States* v. *Cervantes*, No. 5:09-cr-00011-VAP (C.D. Cal. filed Mar. 31, 2010), Dkt. 127.

Some waivers expressly permit challenges to the voluntariness of the plea (claims that courts generally permit regardless of the waiver's language, see pp. 12-13, *infra*). See, *e.g.*, Plea Agreement ¶18, *United States* v. *Baxter*, No. 3:10-cr-00074 (M.D. Tenn. filed Feb. 15, 2013), Dkt. 43 (waiver "shall [not] apply to a claim of involuntariness"). Others expressly permit claims for ineffective assistance of counsel (which courts likewise normally permit regardless of the waiver's specific language, see pp. 11-12, *infra*). See, *e.g.*, Plea Agreement ¶15, *United States* v. *Brooks*, No. 1:14-cr-00209-TWP-TAB (S.D. Ind. filed July 28, 2015), Dkt. 139 ("This * * * waiver does not encompass claims that Defendant received ineffective assistance of counsel in the negotiation of the plea or plea agreement."); Plea Agreement ¶2, *United States* v. *Wong*, No. 4:11-cr-427-PJH-1 (N.D. Cal. filed Jan. 12, 2017), Dkt. 43 (similar); Plea Agreement ¶8,

United States v. *Mangels*, No. 9:16-cr-00006-DLC (D. Mont. filed June 13, 2016), Dkt. 50 (similar).[3]

3. Even seemingly broad appeal waivers have been interpreted to exclude certain claims.

In *State* v. *Straub*, 153 Idaho 882 (2013), for example, the Supreme Court of Idaho held that a challenge to a restitution order fell outside the scope of a broadly worded waiver. *Id.* at 886. The defendant "waive[d] the right to appeal any issues regarding the conviction, including all matters involving the plea or sentencing." *Id.* at 885. The defendant argued that the waiver did "not encompass his right to appeal from the district court's restitution order since restitution proceedings are not part of a defendant's sentence." *Id.* at 886 (quotation marks omitted). The court agreed, concluding that the restitution order was an abuse of discretion and vacating the order. See *id.* at 887, 890.[4]

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[3] Courts sometimes find that ineffective assistance of counsel claims "fall outside the scope" of appeal waivers, but defer them to § 2255 proceedings to allow further development of the record. See, *e.g.*, *United States* v. *Benson*, 553 F. App'x 660, 661 (8th Cir. 2014); *United States* v. *Waupoose*, 394 F. App'x 320, 322 (7th Cir. 2010); cf. *United States* v. *Pease*, 240 F.3d 938, 943 n.5 (11th Cir. 2001) (assuming *Apprendi* issue fell "outside the scope of th[e] appeal waiver").

[4] See also *In re Sealed Case*, 702 F.3d 59, 63-65 (D.C. Cir. 2012) (defendant "did not knowingly waive his right to appeal the restitution order" because appeal waiver was ambiguous); *United States* v. *Schulte*, 436 F.3d 849, 850 (8th Cir. 2006) ("A waiver limited to 'whatever sentence is imposed' does not foreclose an appeal of a restitution order * * *." (quoting *United States* v. *Sistrunk*, 432 F.3d 917, 918 (8th Cir. 2006)); *Oladimeji*, 463 F.3d at 156-157 (restitution order not covered by waiver of right to appeal "sentence"); *United States* v. *Chem. & Metal Indus., Inc.*, 677 F.3d 750, 752 (5th Cir. 2012) (similar); *United States* v. *Zink*, 107 F.3d 716, 717-718 (9th Cir. 1997) (similar).

Courts have identified numerous other issues as beyond the scope of appeal waivers. See, *e.g.*, *United States* v. *Jacobson*, 15 F.3d 19, 22-23 & n.1 (2d Cir. 1994) (reading "agreement narrowly" to find that challenge to court's reliance on defendant's "naturalized status as the basis for the sentence" had not been waived); *United States* v. *Parenteau*, 506 F. App'x 430, 433-434 (6th Cir. 2012) (argument that district court failed to give notice of its reliance on testimony from another proceeding at sentencing was beyond scope of waiver of right to "appeal any sentence imposed"); *United States* v. *Preston*, 598 F. App'x 465, 466 (8th Cir. 2015) ("challenge to the district court's jurisdiction [wa]s beyond the scope of the appeal waiver").[5]

B. Defendants Often Succeed on Appeal Even on Claims Within the Scope of a Waiver

Even where a claim falls within the literal scope of an appeal waiver, courts have allowed defendants to pursue certain types of claims. Many defendants have succeeded in obtaining relief on appeal based on such challenges.

1. The federal courts of appeals agree, for example, that even the broadest waivers do not bar ineffective as-

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[5] See also *State* v. *Hansen*, 156 Idaho 169, 175-176 (2014) (waiver applied only to one count of conviction); *State* v. *Holdaway*, 130 Idaho 482, 484 (1997) (denial of post-judgment motion not barred by waiver that applied only to "judgment and sentence"); *State* v. *Wicklund*, No. 38697, 2011 WL 11067224, at *1 (Idaho Ct. App. Dec. 29, 2011) (similar); *United States* v. *Hartshorn*, 163 F. App'x 325, 329 (5th Cir. 2006) ("condition of supervised release that [defendant] not be released to the Southern District of Texas [ ]or to the residence of his biological family" was "unauthorized by statute" and fell "outside the scope of [defendant's] appeal waiver"); *Hunt*, 843 F.3d at 1028 ("By waiving his right to appeal any 'term of supervised release,' [defendant] did not necessarily give up the right to appeal a condition of such release.").

sistance of counsel claims. See, *e.g.*, *Hurlow* v. *United States*, 726 F.3d 958, 966 (7th Cir. 2013) ("[A] waiver does not bar a challenge regarding the validity of a plea agreement (and necessarily the waiver it contains) on grounds of ineffective assistance of counsel * * *."); *United States* v. *Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009) (similar); *United States* v. *Mabry*, 536 F.3d 231, 243 (3d Cir. 2008) (similar); *Washington* v. *Lampert*, 422 F.3d 864, 871 (9th Cir. 2005) (similar); *United States* v. *Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (similar); *United States* v. *Hernandez*, 242 F.3d 110, 113-114 (2d Cir. 2001) (similar); *United States* v. *Henderson*, 72 F.3d 463, 465 (5th Cir. 1995); *United States* v. *Attar*, 38 F.3d 727, 732-733 (4th Cir. 1994).

The federal courts of appeals have also uniformly held that a defendant may challenge a guilty plea as involuntary or uninformed despite an appeal waiver. See, *e.g.*, *United States* v. *Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc) ("[A] defendant may knowingly and voluntarily enter into a plea agreement waiving the right to a jury trial, but nonetheless fail to have knowingly and voluntarily waived other rights—including appellate rights."); *United States* v. *Teeter*, 257 F.3d 14, 18 (1st Cir. 2001) (similar); *United States* v. *Khattak*, 273 F.3d 557, 558 (3d Cir. 2001); *United States* v. *Joiner*, 183 F.3d 635, 644-645 (7th Cir. 1999). An element of any challenge to the voluntariness of a plea is whether the trial judge made it sufficiently clear that the defendant was waiving the right to appeal. See *Hardman*, 778 F.3d at 899 ("For an appeal waiver to be enforced, the government must show either that (1) the district court specifically questioned the defendant about the provision during the plea colloquy, or (2) it is manifestly clear from the record that the defendant fully understood the significance of the waiver." (quo-

tation marks omitted)); *Khattak*, 273 F.3d at 563 (similar).[6]

Courts have similarly held that a defendant can appeal a conviction as lacking an adequate factual basis under Federal Rule of Criminal Procedure 11(b)(3) despite a facially applicable appeal waiver. See, *e.g.*, *United States* v. *Spruill*, 292 F.3d 207, 215 (5th Cir. 2002).

Defendants have succeeded in obtaining relief on all those types of claims. In *United States* v. *Olson*, 880 F.3d 873 (7th Cir. 2018), for example, the Seventh Circuit refused to enforce an appeal waiver that was not knowing and voluntary, holding that "an invalid waiver cannot insulate an invalid plea." *Id.* at 880. "[B]ecause the district court never asked the right questions" during the plea colloquy, the court did "not know whether [the defendant had] entered a voluntary and intelligent guilty plea" and would not enforce the terms of the agreement. *Id.* at 875. The court thus reversed the conviction. See *id.* at 881.

Likewise, in *United States* v. *Wingo*, 789 F.3d 1226 (11th Cir. 2015), the Eleventh Circuit vacated a conviction on the basis that the district court had failed to conduct a competency hearing. *Id.* at 1228. The court rejected the argument that the sentence appeal waiver barred the defendant's "claim that he was incompetent to

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[6] See also, *e.g.*, *In re Sealed Case*, 702 F.3d at 63-65 (defendant did not "knowingly waive his right to appeal the restitution order" because Rule 11 colloquy did not make clear that waiver covered restitution order); *Teeter*, 257 F.3d at 27 (refusing to enforce waiver "[g]iven the court's failure to make inquiry into the waiver, its unfortunate contradiction of the waiver's terms, and the lack of any correction, then or thereafter"). That inquiry is particularly important here, where, although the plea agreements contained waivers, the trial court "advised Garza of his appeal rights anyway." Pet. App. 3a.

plead guilty and face sentencing," explaining that the "appeal waiver itself would be invalid if [the defendant] lacked the mental capacity to understand and appreciate the nature and consequences of the plea agreement." *Id.* at 1234 n.8.

Similarly, in *United States* v. *Aquino-De La Rosa*, 139 F. App'x 298 (1st Cir. 2005), the defendant "waive[d] the right to appeal * * * [his] guilty plea and any other aspect of [his] conviction," as well as "[t]he adoption by the District Court at sentencing of [certain specifically identified] positions." *Id.* at 299. The defendant appealed, arguing that resentencing was required under *United States* v. *Booker*, 543 U.S. 220 (2005). See *Aquino-De La Rosa*, 139 F. App'x at 299. The government "moved for summary affirmance on the grounds that defendant waived his right to appeal in his plea agreement." *Ibid.* The First Circuit "decline[d] to enforce the waiver because its terms were not clearly explained during the plea colloquy." *Ibid.* "[T]he district court failed to call defendant's attention to the appeal waiver and, instead, affirmatively sought and obtained confirmation of defendant's understanding that he had an unqualified right to appeal his sentence." *Ibid.* The court ultimately agreed with the defendant regarding the alleged *Booker* error and vacated the sentence. *Id.* at 300.[7]

Many other courts have similarly granted relief on the basis that defendants did not knowingly and voluntarily agree to appeal waivers. See, *e.g.*, *United States* v. *Velazquez*, 855 F.3d 1021, 1033 (9th Cir. 2017) (holding "ap-

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[7] See also *United States* v. *Quirindongo-Collazo*, 213 F. App'x 10, 12 (1st Cir. 2007) (finding appeal waiver unenforceable because, during sentencing hearing, "there was no mention by any party of the appeal waiver, nor of any effect that waiver might have on appellant's right to appeal," and vacating sentence on basis of *Booker* error).

peal waiver * * * unenforceable" where defendant was "constructively denied her * * * right to counsel" and vacating conviction); *United States* v. *Atkinson*, 354 F. App'x 250, 252 (6th Cir. 2009) (similar); *United States* v. *Rodriguez-Perez*, 184 F. App'x 451, 453 (5th Cir. 2006) (similar); *United States* v. *Pena*, 314 F.3d 1152, 1154 n.1 (9th Cir. 2003) (similar); *United States* v. *Portillo-Cano*, 192 F.3d 1246, 1252 (9th Cir. 1999); *People* v. *Smith*, 143 A.D.3d 31, 34 (1st Dep't 2016), aff'd, 30 N.Y.3d 626 (2017); *Ex parte De Leon*, 400 S.W.3d 83, 89-91 (Tex. Crim. App. 2013).

Finally, courts have granted relief based on inadequacies in the factual basis for the plea. In *Spruill*, for example, the defendant appealed his conviction on the ground that there was an inadequate factual basis for his plea. 292 F.3d at 215. The court did not dispute that the claim fell within "the waiver of appeal provisions in [the] plea agreement," which "waived the right to appeal [the defendant's] conviction and sentence." *Id.* at 211-215. But the court nonetheless held that the waiver did not bar review because the defendant could not be "prosecuted (and imprisoned) for conduct that does not violate the law." *Id.* at 215 (quotation marks omitted). The court thus vacated the conviction. See *id.* at 221.

2. Courts also grant relief on appeal despite waivers where ordinary contract principles preclude enforcement of the waiver. Like contracts, plea agreements will be enforced (or not) according to ordinary contract principles. See *United States* v. *Scallon*, 683 F.3d 680, 682 (5th Cir. 2012) (applying "'ordinary principles of contract interpretation'" (quoting *United States* v. *Cooley*, 590 F.3d 293, 296 (5th Cir. 2009))).

In *United States* v. *Almonte-Nuñez*, 771 F.3d 84 (1st Cir. 2014), for example, the waiver "foreclosed [the de-

fendant] from appealing only if he was 'sentenced in accordance with the terms and conditions set forth in the Sentence Recommendation provisions' of the Agreement." *Id.* at 88. But the district court imposed sentences that "were not in conformity with the Agreement's sentence recommendation provisions," rendering the waiver "a dead letter." *Id.* at 88-89. Addressing the merits of the defendant's appeal, the court found that the sentence imposed on one count exceeded the statutory maximum and vacated that sentence. *Id.* at 92-93.

As in contract law, moreover, one side's breach can excuse the other side's performance. In *United States* v. *Dawson*, 587 F.3d 640 (4th Cir. 2009), for example, the Fourth Circuit recognized that "[a] defendant's waiver of appellate rights cannot foreclose an argument that the government breached its obligations under the plea agreement." *Id.* at 644 n.4. The court thus vacated the defendant's sentence on the basis that the government "breached the plea agreement when the AUSA failed to recommend to the district court at sentencing that [the defendant] receive a two-level minor participant reduction." *Id.* at 645, 648. Indeed, the government did not even "seek to enforce [the] appeal waiver" because it conceded the breach. *Id.* at 644 n.4.

Similarly, in *United States* v. *Lovelace*, 565 F.3d 1080 (8th Cir. 2009), the Eighth Circuit held an appeal waiver unenforceable where the government had "breached the [plea] agreement by advocating a higher [offense] level" than specified in the agreement. *Id.* at 1087. The court thus considered the defendant's argument that the district court abused its sentencing discretion and vacated the judgment on that basis. *Id.* at 1092-1093.

Also as in contract law, plea agreements will be construed to give effect to the parties' bargain. Following

that principle, in *United States* v. *Woltmann*, 610 F.3d 37 (2d Cir. 2010), the Second Circuit declined to enforce a waiver because doing so would have "denied the parties their bargain and reasonable expectations." *Id.* at 42. The parties had entered into an agreement providing that "'the court [wa]s required to consider any applicable Guidelines provisions as well as other factors enumerated in 18 U.S.C. §3553(a),'" and that "'the defendant agrees not to . . . appeal . . . the conviction or sentence in the event that the Court imposes a term of imprisonment of 27 months or below.'" *Id.* at 39. The district court refused to consider the government's 5K1.1 letter requesting a below-Guidelines sentence because it "believed that because of the appeal waiver, *any* sentence at or below 27 months was appropriate, regardless of whether or how the 5K1.1 letter and the §3553(a) factors—if considered—would bear on the sentence." *Ibid.* The Second Circuit vacated the sentence, finding that the district court "improperly 'relied' on" and "misread" the Agreement. *Id.* at 40. "In so doing," the court explained, "the district court failed to give effect to the parties' expectations and deprived [the defendant] of the benefit that he (and the government) agreed he would receive from signing the Agreement (*i.e.*, a weighing of the 5K1.1 letter and the §3553 factors)." *Ibid.*

3. Courts have likewise refused to enforce waivers where doing so would undermine the fundamental fairness of the proceedings or result in a manifest miscarriage of justice.

In *United States* v. *Adams*, 814 F.3d 178 (4th Cir. 2016), for example, the Fourth Circuit vacated a conviction on the basis of actual innocence despite the fact that "neither party argue[d] that [the defendant's] waiver was invalid, and there [wa]s no evidence in the record to sup-

port such a conclusion." *Id.* at 182. The defendant had pleaded guilty to one count each of robbery, using and carrying a firearm during a crime of violence, and being a felon in possession of a firearm. See *id.* at 180. The plea agreement permitted him "to challenge his conviction or sentence" only on "the basis of ineffective assistance of counsel or prosecutorial misconduct." *Ibid.* The defendant later sought to vacate his felon-in-possession conviction on the basis of a new Fourth Circuit decision that rendered his prior convictions misdemeanors, not felonies. *Id.* at 181. In light of that decision, the defendant was actually innocent of the felon-in-possession count. *Id.* at 182-183. The court "conclude[d] that [his] claim of actual innocence [wa]s outside the scope of the appeal waiver" and vacated the conviction. *Id.* at 182, 185.

Similarly, in *Mathis* v. *United States*, No. 7:09-cr-139-1BO, 2012 WL 1156438 (E.D.N.C. Apr. 6, 2012), the court concluded that whether the defendant "was properly classified as a career offender" in light of a change in law was an error "the defendant could not have reasonably contemplated at the time of the plea agreement" and was thus "not barred by [the] appeal waiver, even if that waiver was knowing and voluntary." *Id.* at *5 (quotation marks omitted). Addressing the merits, the court held that the defendant was "no longer a career offender," granted his request for postconviction relief pursuant to 28 U.S.C. §2255, and vacated his sentences. *Mathis*, 2012 WL 1156438, at *6.

And in *United States* v. *Castro*, 704 F.3d 125 (3d Cir. 2013), the Third Circuit found that the defendant had entered into a "knowing and voluntary waiver" that "foreclosed[d] his appeal" from his false-statement conviction. *Id.* at 137. However, the court declined to enforce the waiver because the record was "devoid of evidence that

[the defendant] made a false statement." *Ibid.* The court thus reversed the conviction to avoid "a manifest miscarriage of justice." *Id.* at 138, 144 (quotation marks omitted).

4. Finally, a defendant may succeed on appeal despite an appeal waiver because the waiver itself can be waived.

In Idaho, for example, appeal waivers have no effect if the State chooses not to invoke them on appeal (*i.e.*, if the State waives the waiver). See, *e.g.*, *State* v. *Rendon*, No. 38275, 2012 WL 9492805, at *1 n.1 (Idaho Ct. App. May 11, 2012) (State "fail[ed] to raise" waiver); *State* v. *Rodriguez*, No. 45233, 2018 WL 700168, at *1 n.1 (Idaho Ct. App. Feb. 5, 2018) (similar). Federal courts follow the same rule. See, *e.g.*, *United States* v. *Cheney*, 571 F.3d 764, 769 (8th Cir. 2009) ("[T]he government does not contend that [defendant's] guilty plea bars him from challenging the factual basis for his plea—in effect, waiving any claim to rely on a possible waiver * * *."); *United States* v. *Obak*, 884 F.3d 934, 937 (9th Cir. 2018) (holding that "the government waived its ability to rely on [the defendant's appeal] waiver" because "the government's brief * * * did not raise the waiver issue").

Defendants have succeeded on claims that would ordinarily have been precluded precisely because the waiver was waived. See, *e.g.*, *United States* v. *Ortega-Hernandez*, 804 F.3d 447, 449, 451 (D.C. Cir. 2015) (holding that court "need not enforce an appeal waiver" barring appeals of sentence "when the government ha[d] not asked [it] to do so" and instructing district court to vacate sex-offender registration condition on remand); *United States* v. *Jones*, 667 F.3d 477, 486 (4th Cir. 2012) (declining to "sua sponte enforce" waiver and holding that district court's imposition of career offender enhancement

was error); *United States* v. *Story*, 439 F.3d 226, 229, 232-233 (5th Cir. 2006) (finding that "the government ha[d] waived" waiver of "right to appeal [defendant's] sentence on all grounds" and remanding for resentencing in light of *Booker* error).

C. The Decision Below Ignores the Potential for Meritorious Claims Even in Cases Involving Appeal Waivers

The courts below asserted that where a defendant accepts an appeal waiver in a plea agreement, no appellate relief remains available. See, *e.g.*, Pet. App. 36a ("When a defendant has waived his right to appeal in an enforceable plea agreement, dismissal—not consideration on the merits—is the fate that awaits any appeal the defendant files."); *id.* at 26a (similar); *id.* at 13a (similar). Federal courts following the minority approach have likewise claimed that "the 'presumption of prejudice'" under *Flores-Ortega* "really does not suit the situation in which a waiver is present" because the "entitlement" to pursue an appeal "disappears" once the defendant agrees to a waiver. *Mabry*, 536 F.3d at 244; see *Nuñez* v. *United States*, 546 F.3d 450, 454-456 (7th Cir. 2008) (similar). That logic is flawed.

This Court held in *Flores-Ortega* that prejudice must be presumed where counsel fails to file a notice of appeal because that decision causes "the forfeiture of a proceeding itself." 528 U.S. at 483. The same is true where the defendant has signed an appeal waiver. Regardless of the waiver, counsel's failure to file a notice of appeal invariably results in the forfeiture of a judicial proceeding. And, as shown above, the proceeding can—and often does—result in substantive relief on appeal, even in the presence of a purported waiver.

This Court has held that a presumption of prejudice is appropriate where the "consequences" of an error are "unquantifiable and indeterminate." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (quotation marks omitted). An attorney's failure to file a notice of appeal over the client's instructions is such an error, regardless of whether there is an appeal waiver. Where counsel refuses to notice an appeal, the court simply "would have to speculate" about how a hypothetical direct appeal would have played out. *Id.* at 151. That is the kind of error for which a presumption of prejudice is appropriate. See *Flores-Ortega*, 528 U.S. at 483 ("[W]e cannot accord any presumption of reliability to judicial proceedings that never took place." (quotation marks and citation omitted)).

Abandoning the presumption of prejudice for cases involving appeal waivers would not significantly reduce any burdens on the courts. With or without a presumption of prejudice, defendants will surely continue to file postconviction motions based on their attorneys' failures to file notices of appeal. And, as a result, courts addressing their ineffective assistance of counsel claims will have to determine whether the appeal waiver would have precluded their claims on appeal. Courts following the minority approach already undertake that onerous analysis. See, *e.g.*, *Mabry*, 536 F.3d at 237 (court has "an affirmative duty both to examine the knowing and voluntary nature of the waiver and to assure itself that its enforcement works no miscarriage of justice"); *United States* v. *Egwuekwe*, No. 1:14-cr-6, 2017 WL 5009100, at *6-8 (M.D. Pa. Nov. 2, 2017) (examining same); *United States* v. *Doss*, No. 1:12-cr-326, 2017 WL 1709397, at *4-6 (M.D. Pa. May 3, 2017) (similar); *United States* v. *Dunlap*,

No. 10-190, 2010 WL 4614557, at *2-4 (W.D. Pa. Nov. 5, 2010) (similar).[8]

Nor is there any basis for limiting the presumption's applicability based on the scope of the particular waiver in the case. As shown above, courts have found certain claims to be beyond the scope of even seemingly broad appeal waivers. And courts have regularly allowed defendants to pursue various types of claims on appeal even when they fall within the literal scope of a waiver.

Moreover, as shown above, waivers vary significantly in form and scope. Thus, unless this Court applies a uniform presumption of prejudice to all failures to file a notice of appeal at the client's direction, courts will inevitably be asked to address the issue for each different type of appellate waiver. There is no need to waste the courts' time and resources deciding the issue piecemeal for every different type of appellate waiver. What matters is that all waivers permit *some* form of appeal. Accordingly, all defendants who instruct their counsel to file a notice of appeal are prejudiced when counsel fails to do so.

II. Postconviction Proceedings Are Not An Adequate Substitute For Direct Appellate Review

In some cases, defendants may be able to pursue their claims in postconviction proceedings. For a number of

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[8] See also *Solano* v. *United States*, 812 F.3d 573, 576-578 (7th Cir. 2016) (refusing to presume prejudice and instead determining whether underlying claim fell within scope of appellate waiver after defendant brought ineffective-assistance claim based on counsel's failure to appeal); *United States* v. *Hull*, No. 16 C 2096, 2017 WL 6733689, at *3 (N.D. Ill. Dec. 19, 2017) (similar); *Reynolds* v. *United States*, No. 12-12-RGA, 2014 WL 6983354, at *2-3 (D. Del. Dec. 9, 2014) (similar); *Martinez* v. *United States*, No. 05-cr-123-12, 2008 WL 4889665, at *7-9 (E.D. Pa. Nov. 12, 2008) (similar).

reasons, however, those proceedings cannot adequately substitute for a direct appeal.

A. Claims That Are Not Raised on Direct Appeal Generally Cannot Be Raised in Postconviction Proceedings

Often, depriving a defendant of an appeal will result in the forfeiture of any review at all. Generally, "claims not raised on direct appeal may not be raised on collateral review." *Massaro* v. *United States*, 538 U.S. 500, 504 (2003). Thus, if an attorney decides not to file a notice of appeal because a plea agreement includes a waiver, the defendant will often be unable to challenge the validity of the plea in postconviction proceedings.

Idaho is no exception. Under Idaho law, a "claim or issue which was or could have been raised on appeal *may not be considered* in post-conviction proceedings." *Hughes* v. *State*, 148 Idaho 448, 462 (Ct. App. 2009) (emphasis added); see *ibid.* ("An application for post-conviction relief is not a substitute for an appeal." (citing Idaho Code § 19-4901(b)). The Idaho courts have determined that at least some challenges to the validity of a guilty plea should be raised on direct appeal. See *State* v. *Hernandez*, 121 Idaho 114, 116 (Ct. App. 1991) ("A defendant's claim that his plea of guilty was involuntarily given is an attack on the validity of the original conviction, and must be timely raised on a direct appeal from the judgment of conviction."); cf. *State* v. *Colyer*, 98 Idaho 32, 33 (1976) (vacating judgment of conviction because "the record does not adequately show that appellant understood the consequences of a plea of guilty"); *State* v. *Cope*, 142 Idaho 492, 496-497 (2006) (determining that record showed the plea was knowing, intelligent, and voluntary). The State frequently seeks to dismiss postconviction petitions relating to the validity of guilty pleas on

the basis that the petitioner could and should have raised the claim on direct appeal. See, *e.g.*, *Workman* v. *State*, 144 Idaho 518, 524 (2007) ("[T]he State and the district court observed that many of [petitioner's] claims regarding his guilty plea either were or should have been raised on direct appeal.").

Proposing that defendants like Mr. Garza wait to raise claims until postconviction review lays an unfair trap: By that point, it may be too late to raise the claims at all.

B. Higher Pleading Standards Apply in Postconviction Proceedings

The pleading standards for a postconviction petitioner are typically far higher than they are on direct appeal. Under Idaho law, for example, a "petition for post-conviction relief initiates a proceeding that is civil in nature." *Pentico* v. *State*, 159 Idaho 350, 353 (Ct. App. 2015). But, unlike the average civil complaint, a postconviction petition "must contain *much more* than a short and plain statement of the claim that would suffice for a complaint." *Id.* at 354 (emphasis added); see also *Fields* v. *State*, 155 Idaho 532, 536 (2013) (same). Instead, "a petition for post-conviction relief must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records, or other evidence supporting its allegations must be attached or the petition must state why such supporting evidence is not included with the petition." *Pentico*, 159 Idaho at 354; *Fields*, 155 Idaho at 536 (citing Idaho Code §19-4903). "In other words, the petition must present or be accompanied by admissible evidence supporting its allegations or the petition will be subject to dismissal." *Pentico*, 159 Idaho at 354; see *State* v. *Payne*, 146 Idaho 548, 560-561 (2008) (similar).

The stringent pleading standards for postconviction petitioners have real teeth. Idaho courts routinely deny relief where petitioners do not submit the required evidence. See, *e.g.*, *Self* v. *State*, 145 Idaho 578, 581 (Ct. App. 2007) (dismissing petition because petitioner failed to provide affidavit or deposition testimony by expert supporting ineffectiveness claim); *Murphy* v. *State*, 143 Idaho 139, 150 (Ct. App. 2006) (dismissing petition because petitioner failed to proffer admissible evidence establishing details of how juror allegedly slept through trial); *Small* v. *State*, 132 Idaho 327, 333 (Ct. App. 1998) (dismissing petition because petitioner failed to introduce medical testimony concerning effect of medication she was on during trial).

None of those standards applies to a criminal defendant prosecuting a direct appeal. All the defendant must do to adequately present an issue on direct appeal is support it with "propositions of law, authority, or argument." *State* v. *Zichko*, 129 Idaho 259, 263 (1996); see Fed. R. App. P. 28(a)(8); Idaho App. R. 35(a)(4); *Cal. Pac. Bank* v. *FDIC*, 885 F.3d 560, 570 (9th Cir. 2018) ("arguments are waived" only where "the appellant does not present any argument to support its assertions and cites no authority" or presents only "inadequately briefed and perfunctory arguments"); see, *e.g.*, *United States* v. *Suarez*, 879 F.3d 626, 639 (5th Cir. 2018) (appellant's "brief sufficiently presented his argument" where it set out legal standard and cited record). A defendant should not have to satisfy a more challenging pleading standard just because counsel failed to notice the appeal the defendant wanted and was entitled to pursue.

C. There Is No Constitutional Right to Counsel in Postconviction Proceedings

Perhaps most importantly, "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991). By contrast, appointed counsel *must* be furnished to indigent defendants on direct appeal. See *Evitts* v. *Lucey*, 469 U.S. 387, 393-394 (1985).

Similarly, under Idaho law, a postconviction petitioner has no statutory right to postconviction counsel except in capital cases. See *Murphy* v. *State*, 156 Idaho 389, 395 (2014). In non-capital postconviction cases—*i.e.*, the overwhelming majority of such actions—the appointment of counsel "lies within the discretion of the district court." *Melton* v. *State*, 148 Idaho 339, 341 (2009).[9] Idaho appellate courts regularly affirm decisions denying counsel to postconviction petitioners. See, *e.g.*, *Nelson* v. *State*, 157 Idaho 847, 856 (Ct. App. 2014); *Gonzales* v. *State*, 151 Idaho 168, 172-173 (Ct. App. 2011); *Judd* v. *State*, 148 Idaho 22, 24-26 (Ct. App. 2009).

A postconviction proceeding where the defendant is without legal assistance cannot serve as an adequate replacement for a direct appeal where the defendant has the invaluable benefit of an attorney. In *Workman*, for example, the Supreme Court of Idaho upheld the denial of postconviction counsel while rejecting the defendant's arguments that his plea was involuntary and never formally entered. See 144 Idaho at 527-529. Those are ex-

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[9] Only a tiny percentage of Idaho prisoners are under sentence of death. See Idaho Dep't of Corr., *Supervised Population Snapshot*, https://dash.idoc.idaho.gov/ (26,044 prisoners as of Aug. 15, 2018); Idaho Dep't of Corr., *Death Row*, https://www.idoc.idaho.gov/content/prisons/death_row (9 prisoners on death row as of Aug. 15, 2018).

actly the sort of issues that can be raised on direct appeal, even with a waiver. See pp. 12-13, *supra*. The State's approach would obligate defendants whose lawyers refuse to file notices of appeal to litigate *pro se* the very same issues that they could and should have litigated on direct appeal with all the advantages of representation.

* * *

Idaho's postconviction scheme exemplifies why a presumption of prejudice is appropriate where counsel fails to file a notice of appeal. Channeling claims into postconviction proceedings forces defendants to pursue their claims without the benefit of legal representation, to overcome onerous pleading standards, and to risk losing the claims altogether. It creates an intolerable risk that defendants who involuntarily signed guilty pleas will end up in prison. When a defense attorney deprives a client of the chance for a direct appeal, the only way to ensure that risk does not materialize is by presuming prejudice.

CONCLUSION

The judgment of the Supreme Court of Idaho should be reversed.

Respectfully submitted.

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No. 17-1026

In the Supreme Court of the United States

GILBERTO GARZA, JR.,

Petitioner,

v.

IDAHO,

Respondent.

On Writ of Certiorari to the Supreme Court of Idaho

BRIEF FOR LOUISIANA, ALABAMA, ARIZONA, ARKANSAS, INDIANA, KANSAS, NEBRASKA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, WISCONSIN, AND WYOMING AS *AMICI CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL, A DEFENDANT MUST PROVE A VIOLATION OF *BOTH* PRONGS OF THE *STRICKLAND V. WASHINGTON* TEST. 6

II. HONORING A CLIENT'S INITIAL AUTONOMOUS DECISION IS NOT DEFICIENT PERFORMANCE UNDER *STRICKLAND*. 8

A. The Inclusion of an Appeal Waiver in a Plea Agreement Has Legal Significance. 9

1. A plea agreement constitutes a legally binding contract, and the parties bargain for provisions waiving appeal. 9

2. A defendant exercises his right to "autonomy" when he chooses to waive his right to appeal in exchange for substantial benefits. 11

B. Neither Party Has a Right to Breach a Plea Agreement. 14

1. In all other areas, defendants are held to their waivers. 14

2. Prosecutors are not allowed to breach the terms of a plea agreement. 17

3. Defendant is not the only person harmed by his decision to breach a plea agreement. 18

C. It Is Not Unreasonable or Deficient Performance for an Attorney to Refuse to File an Appeal on an Issue Clearly Covered by the Plea Agreement. 20

III. PREJUDICE SHOULD NOT BE PRESUMED. ... 21

A. If a Defendant Has No Right to a Proceeding, Counsel's Actions Cannot "Lose the Proceeding" If He Fails to File a Notice of Appeal. 22

B. It Is Not "Profoundly" Unfair to Require a Defendant to Make an Individualized Showing that His Appeal Would Have Had Merit. 23

C. States Provide Defendants Adequate Avenues to Assert Claims that Fall Outside the Scope of Appeal Waivers. 25

IV. APPEAL WAIVERS BENEFIT MULTIPLE PARTIES, AND SO A RULE DIMINISHING THEIR VALUE WOULD NEGATIVELY AFFECT THE CRIMINAL JUSTICE SYSTEM. 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Abney v. United States,
431 U.S. 651 (1977) 22

Adams v. U.S. ex rel McCann,
317 U.S. 269 (1942) 14

Boykin v. Alabama,
395 U.S. 238 (1969) 12

Brady v. United States,
397 U.S. 742 (1970) 10, 11

Brown v. United States,
356 U.S. 148 (1958) 15

Buck v. Davis,
137 S. Ct. 759 (2017) 28

Calderon v. Thompson,
523 U.S. 538 (1998) 24

Class v. United States,
138 S. Ct. 798 (2018) 10

Coleman v. Thompson,
501 U.S. 722 (1991) 24

Commonwealth v. Grant,
813 A.2d 726 (Pa. 2002) 26

Cook v. State,
14-06-00515-CR, 2006 WL 2075048
(Tex. App. July 27, 2006) 23

Dolan v. United States,
560 U.S. 605 (2010) 19

Faretta v. California,
422 U.S. 806 (1975) 17

Griffin v. Illinois,
351 U.S. 12 (1956) 22

Herrera v. Collins,
506 U.S. 390 (1993) 24

Hooks v. State,
668 S.E.2d 718 (2008) 22

Hughey v. United States,
495 U.S. 411 (1990) 19

Indiana v. Edwards,
554 U.S. 164 (2008) 17

Jenkins v. Anderson,
447 U.S. 231 (1980) 15

Jones v. Barnes,
463 U.S. 745 (1983) 7, 22

Jones v. Commonwealth,
795 S.E.2d 705 (2017) 22

Kansas v. Cheever,
134 S. Ct. 596 (2013) 15

Kingsley v. United States,
968 F.2d 109 (1st Cir. 1992) 9

Lee v. State,
69 N.E.3d 955 (Ind. Ct. App. 2016) 23

Lout v. State,
111 P.3d 199 (Mont. 2005) 11

Martinez v. Court of Appeal of California, Fourth Appellate Dist.,
528 U.S. 152 (2000) 17, 22

Martinez v. Ryan,
566 U.S. 1 (2012) 24

Massaro v. United States,
538 U.S. 500 (2003) 25, 26

McCoy v. Louisiana,
138 S. Ct. 1500 (2018) 11

McDaniel v. State,
38 N.E.3d 226 (Ind. Ct. App. 2015) 11

McKane v. Durston,
153 U.S. 684 (1894) 22

McKaskle v. Wiggins,
465 U.S. 168 (1984) 17

McKinney v. State,
396 P.3d 1168 (Id. 2017) 27

McMann v. Richardson,
397 U.S. 759 (1970) 10

Mojica v. State,
437 S.E.2d 806 (Ga. 1993) 15

Nix v. Whiteside,
475 U.S. 157 (1986) 14

Nunez v. United States,
546 F.3d 450 (7th Cir. 2008) 20, 21

Parker v. North Carolina,
397 U.S. 790 (1970) 10

Paroline v. United States,
572 U.S. 434 (2014) 19

Payne v. Tennessee,
501 U.S. 808 (1991) 24

Peguero v. United States,
526 U.S. 23 (1999) 7

People v. Castillo,
208 A.D.2d 944, 618 N.Y.S.2d 78 (1994) 23

People v. Spencer,
513 N.E.2d 514 (Ga. 4th Dist. 1987) 15

Puckett v. United States,
556 U.S. 129 (2009) 9

Ricketts v. Adamson,
483 U.S. 1 (1987) 9, 16

Rodriguez v. United States,
395 U.S. 327 (1969) 7

Roe v. Flores-Ortega,
528 U.S. 470 (2000) ..... *passim*

Santobello v. New York,
404 U.S. 257 (1971) 10, 17

In re Sealed Case,
283 F.3d 349 (D.C. Cir. 2002) 27

State v. Barrett,
255 P.3d 472 (Or. 2011) 19

State v. Casey,
44 P.3d 756 (Ut. 2002) 19

State v. Green,
943 P.2d 929 (Id. 1997) 27

Strickland v. Washington,
466 U.S. 668 (1984) 1, 2, 6, 8

Teague v. Lane,
489 U.S. 288 (1989) 28

United States v. Andis,
333 F.3d 886 (8th Cir. 2003) 27

United States v. Ashe,
47 F.3d 770 (6th Cir. 1995) 27

United States v. Bushert,
997 F.2d 1343 (11th Cir. 1993) 27

United States v. Clark,
55 F.3d 9 (1st Cir. 1995) 18

United States v. Evans,
361 Fed. App'x 4 (10th Cir. 2010) 12

United States v. Golden,
255 Fed. App'x 319 (10th Cir. 2007) 12

United States v. Hahn,
359 F.3d 1315 (10th Cir. 2004) 12

United States v. Hernandez,
134 F.3d 1435 (10th Cir. 1998) 27

United States v. Hirsch,
207 F.3d 928 (7th Cir. 2000) 12

United States v. Khattak,
273 F.3d 557 (3d Cir. 2001) 27

United States v. Matos-Quinones,
456 F.3d 14 (1st Cir. 2006) 17, 18

United States v. Melancon,
972 F.2d 566 (5th Cir. 1992) 27

United States v. Navarro-Botello,
912 F.2d 318 (9th Cir. 1990) 27

United States v. Norris,
486 F.3d 1045 (8th Cir. 2007) 9

United States v. Novosel,
481 F.3d 1288 (10th Cir. 2007) 9

United States v. Ready,
82 F.3d 551 (2d Cir. 1996) 9

United States v. Rivera-Rodriquez,
489 F.3d 48 (1st Cir. 2007) 17

United States v. Rutan,
956 F.2d 827 (8th Cir. 1992) 27

United States v. Salcido-Contreras,
990 F.2d 51 (2d Cir. 1993) 27

United States v. Sandoval-Lopez,
409 F.3d 1193 (9th Cir. 2004) 8, 9

United States v. Satterwhite,
893 F.3d 352 (6th Cir. 2018) 15

United States v. Schmidt,
47 F.3d 188 (7th Cir. 1995) 27

United States v. Solorzano-Rivera,
368 F.3d 1073 (9th Cir. 2004) 15

United States v. Teeter,
257 F.3d 14 (1st Cir. 2001) 27

United States v. Wiggins,
905 F.2d 51 (4th Cir. 1990) 27

United States v. Wood,
378 F.3d 342 (4th Cir. 2004) 9

Vance v. State,
2009 WL 1450412
(Tex. Cr. App. May 26, 2009) 23

STATUTES

18 U.S.C. § 3771 18

Cal. Penal Code § 1192.5 (West) 16

Cal. Penal Code § 1237.5 (West) 23

Ga. Code Ann. § 17-7-93 16

Ga. Code Ann. § 17-9-60 26

8 G. C. A. § 120.42 16

Ind. C. 35-35-1-4 16

Kan. Stat. Ann. § 22-3210 (West) 16

Kan. Stat. Ann. § 22-3502 26

Kan. Stat. Ann. § 22-3504 26

Kan. Stat. Ann. § 22-3602 22

La. Code Crim. Proc. art. 559 16

La. Code Crim. Proc. art. 851 26

La. Code Crim. P. art. 859 26

La. Code Crim. Proc. art. 881.2A(2) 22
Md. Code Ann., Cts. & Jud. Proc. § 12-301 22
Md. Code Ann., Cts. & Jud. Proc. § 12-302 22
Md. Code Ann. Crim. Proc. § 8-401 26
Md. Code Crim. Proc. § 11-103 (West) 19
Nev. R. S. 176.165 16
N.Y.C.P.L. § 220.60(3) 16
22 Ok. St. Ann. § 517 16
O.R.S. § 135.365 16
U. C. A. 1953 § 39-6-38 16
Ut. C. A. 1953 § 77-13-6 16
Va. Code Ann. § 19.2-296 ..... 16, 26
Wisc. S.A. 971.08 16

RULES

Fed. R. Crim. P. 11(d) 16
Fed. R. Crim. P. 11(e) 16
16A Ariz. R. Crim. Proc. 17.5 16
Ark. R. Crim. Proc. 26.1 16
Ga. Uniform Sup. Court R. 33.12 16
Id. Crim. R. 35 ..... 5, 26
Ky. R. Crim. Proc. 8.10 16
Md. R. 4-242 16

Md. Rule 4-332 26

Md. Rule 4-345 26

Md. Rule 8-204 23

MI Rules MCR 6.310 16

49 Minn. S.A. R. Crim. Proc. 15.05 16

N.J. R. 3:9-3(e) 16

N.J. Ct. R. 3:21-1 16

Oh. Crim. R.32.1 16

Pa. C. C. R. Crim. P. No. 591 16

SDCL § 23A-27-11 16

SDCL § 33-10-136 16

Tenn. R. App. Proc. 3 22

Tenn. R. Crim. P. 32(f) 16

Tenn. R. Crim. P. 34 26

Tenn. R. Crim. P. 35 26

Ut. R. Juv. P. 25A 16

Crim. Proc. § 11-103 (West) 19

OTHER AUTHORITIES

Conn. Practice Book § 39-26 16

Conn. Practice Book 1998, § 39-27 16

Nancy J. King & Michael E.O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L. J. 209 (Nov. 2005). 10, 27, 28

INTEREST OF AMICI CURIAE

The undersigned Attorneys General are the chief legal officers of our respective States. We prosecute crimes and often enter into plea agreements that benefit not only the State, but also victims, the defendant, and the criminal justice system. Our perspective will therefore aid the Court in understanding the potential consequences of the per se rule sought by Petitioner.

Waivers of the right to appeal contained in plea agreements have become increasingly important to the criminal justice system. Appeal waivers ensure finality for victim and defendant and avert the cost and time spent on a long, drawn out, and often meritless appeals process. They are a valid and important component of plea agreements.

Although Petitioner focuses on the prejudice prong of the *Strickland v. Washington* ineffective-assistance-of-counsel test, a logical predicate question is whether counsel performs deficiently when, as in this case, he declines his client's request to file an appeal on an issue plainly covered by an appeal waiver. Should the Court hold that an attorney *must* appeal an explicitly waived issue at his client's request or be found to have rendered deficient performance, it would effectively create a "right" for a defendant to sandbag the system by negotiating a plea deal and then ignoring it. This would remove any incentive for prosecutors to offer defendants reduced sentences and charges or other benefits in exchange for appeal waivers. The *Amici* States have an interest in protecting the integrity of the negotiated bargain, in retaining appeal waivers as

meaningful bargaining chips for defendants, and in giving victims the finality appeal waivers afford.

SUMMARY OF ARGUMENT

A defendant has no right to breach any term of an informed negotiated plea agreement that was voluntarily entered. That includes his autonomously negotiated promise not to appeal. Thus, where an attorney refuses to breach the agreement by filing an appeal on an issue plainly covered by the agreement, he honors and protects his client's decision and explicit prior instruction to him to enter into the agreement in exchange for substantial benefits. Upon waiving his right to file an appeal, under state law an appellate proceeding is no longer available to him. Thus, he is not prejudiced by "losing" a proceeding to which he has no right. Nor is it fundamentally unfair to him to have to, at least, show that his appeal waiver was not valid—something of which he has personal knowledge. We turn first to a predicate issue, then address performance, prejudice, and fairness.

A. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant asserting an ineffective-assistance-of-counsel claim must show his counsel performed deficiently and the deficient performance prejudiced him. Citing *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), Petitioner conflates these two requirements into the sole issue of prejudice. But neither *Flores-Ortega* nor the two other cases upon which Petitioner relies addressed whether counsel performs deficiently when denying a defendant's request to appeal an issue plainly within the scope of a plea agreement's appeal waiver. We therefore first turn to that predicate issue.

B. Counsel does not perform deficiently when he honors the defendant's autonomous decision to enter into a plea agreement containing an appeal waiver and declines the defendant's later request to appeal an issue within the waiver's scope. Plea agreements are enforceable contracts and defendants alone have the protected right to determine the terms. At the state level, most such agreements do not contain a waiver of the right to file an appeal. Where they do, however, the right is forfeited in exchange for additional benefits such as substantial reductions in sentencing and charging, as in this case. As with any contract, especially one where constitutional rights are being waived, the defendant must enter into it voluntarily and be adequately informed of its risks and benefits. But once that is assured, and the defendant agrees to the provision, *the right is gone*—as an exercise of the defendant's autonomy.

A defendant does not have a "right" to breach a valid plea agreement any more than he has the right to reverse his waiver of other constitutional rights. For example, a defendant cannot waive his right to remain silent, testify, and then "re-invoke" the right to avoid cross-examination. In the same manner, Petitioner cannot retain the benefits of the plea agreement while appealing in the hopes of reducing his agreed-to sentence. The prosecutor, judge, and victim have relied on his promises. And the prosecutor is also strictly held to the terms of the agreement.

It is therefore reasonable for counsel to refuse to assist a defendant in breaching his contractual, autonomously made, promise not to appeal. Absent an appeal waiver, counsel might do no harm filing a

fruitless appeal. But where a defendant agreed to an appeal waiver, filing an appeal carries additional consequences as it could void the agreement, leading to the reinstitution of charges. Here, that could have led to two life sentences rather than the approximately ten years he received under the plea agreement. Absent a defendant's request to withdraw from the plea agreement entirely (and Petitioner made no such request), counsel acts properly when he refuses to risk that outcome.

C. *Flores-Ortega* found that a defendant was presumptively prejudiced by the denial of a judicial proceeding that he wanted and to which he had a *right*. Petitioner here only *wanted* access to an appellate proceeding to change his sentence—but he had no *right* to one. The right to an appeal is a state statutory creation; thus, states are entitled to establish the procedures for appealing lower court judgments. When a defendant waives his appellate rights, he should not be heard before an appellate court.

Petitioner knowingly and intelligently waived his right to appeal in exchange for substantial negotiated benefits. Contrary to Petitioner's contention, it is not "unfair" to require defendants to show on a case-by-case basis that they were prejudiced by counsel's refusal to appeal a waived issue. It is not unfair to require a defendant to abide by his promise or show why the appeal waiver is not valid. Defendants are not the only ones who suffer the consequences of breaching their plea agreements—the state and the victim are denied the finality they were promised in exchange for the plea agreement.

Petitioner focuses on the few issues that survive appeal waivers, such as arguments that a defendant did not enter the plea agreement voluntarily or that his counsel performed ineffectively during the plea process. But he never asked his counsel to pursue those claims. More generally, it is not unfair for states to channel them to their post-conviction review process. As the Court has recognized, both of those issues are better reviewed in post-conviction proceedings, where the facts outside of the record can be explored. Furthermore, defendants have other (non-appellate) options, some of which a defendant is required to pursue before an appellate court has jurisdiction. Petitioner could have filed a motion to modify his sentence under Idaho Criminal Rule 35. Or, if he felt his plea was involuntary, he could have moved to withdraw his plea. He chose not to pursue either course, presumably because he did not want to undo the excellent bargain he made.

D. Appeal waivers benefit multiple parties. They guarantee finality, are offered in exchange for reduced sentences, and increase the likelihood that courts will approve a plea agreement. Should the Court accept Petitioner's argument, it would create a new "right" to breach promises made in a plea agreement and would damage the integrity of the plea-bargaining process. If a prosecutor cannot promise the finality that such a waiver provides, defendants will receive longer sentences, more cases will go to trial, and victims will have to wait longer to receive finality.

The judgment below should be affirmed.

ARGUMENT

I. TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL, A DEFENDANT MUST PROVE A VIOLATION OF *BOTH* PRONGS OF THE *STRICKLAND V. WASHINGTON* TEST.

In *Roe v. Flores-Ortega*, this Court explicitly held that *both* prongs of the two-part test set forth in *Strickland v. Washington* apply to claims "that counsel was constitutionally ineffective for failing to file a notice of appeal." 528 U.S. 470, 477 (2000). Petitioner appears to conflate the two requirements (deficient performance and prejudice) into the *sole* issue of prejudice.

Before prejudice can be examined, however, the predicate question must be answered: Did counsel's representation fall below an objective standard of reasonableness? Petitioner appears to simply assume counsel's conduct was per se deficient based on *Flores-Ortega*'s statement that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Pet'r's Br. 12 (quoting *Flores-Ortega*, 528 U.S. at 477) (additional citations omitted)). But *Flores-Ortega* did not involve an initial decision to waive the right to appeal and specifically rejected any "per se rule" providing that counsel "must file a notice of appeal [in all cases]." 528 U.S. at 478. Such a per se rule, stated the Court, was "inconsistent with *Strickland's* holding that 'the performance inquiry must be whether counsel's assistance was reasonable considering all of the circumstances.'" *Id.* (citing *Strickland*, 466 U.S. at 688). The Court noted that, under that test, "courts must 'judge the reasonableness

of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Id.* at 477.

Flores-Ortega further noted that the Court has held that "a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). That is precisely what a defendant such as Petitioner does when he signs a plea agreement containing an appeal waiver. A defendant in such a case gives his attorney conflicting instructions. Nothing in *Flores-Ortega* resolved how counsel's performance should be assessed in that situation.

The two cases cited by *Flores-Ortega* and upon which Petitioner also relies are equally off-point. Pet'r's Br. 12. *Rodriguez v. United States* involved counsel who did not file a notice of appeal after a trial, not a plea agreement. 395 U.S. 327, 328 (1969). And in *Peguero v. United States*, the issue was whether the trial court erred by failing to inform the defendant of his right to appeal as required by a federal statute. 526 U.S. 23, 25 (1999). The Court held that it was not necessary where the defendant already knew of the right. *Id.* Although the defendant contended his counsel was ineffective in not filing an appeal, the Court denied that claim because the district court had found the defendant told his attorney not to file an appeal. *Id.*

II. HONORING A CLIENT'S INITIAL AUTONOMOUS DECISION IS NOT DEFICIENT PERFORMANCE UNDER *STRICKLAND*.

Where a defense counsel negotiates a beneficial deal with the prosecutor on behalf of his client, and the client specifically tells him to accept the plea agreement—including its appeal waiver—he has done all that a reasonable defense attorney can do to render competent and efficient counsel. Defense counsel does not perform deficiently when he refuses his client's later request to appeal an issue clearly covered by the waiver. As the Ninth Circuit observed, this would be a "particularly plain instance of where 'ineffective assistance of counsel' is a term of art that does not mean incompetence of counsel," *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1199 (9th Cir. 2004), and would be baffling. Whatever counsel's obligation may be regarding issues *outside* the scope of the waiver, he is not obligated to blindly follow the defendant's request to breach the agreement to pursue a futile (because waived) appeal where the defendant did not say he wanted to withdraw from the plea agreement and lose its benefits.

Although the defendant in *Flores-Ortega* had not signed an appeal waiver, the Court emphasized such waivers matter. It stated that whether the defendant had entered into a plea agreement that "expressly waived some or all appeal rights" was a "highly relevant factor" that must be considered as part of the totality of circumstances review. *Id.* at 480. The concurring Justices went further, finding counsel might not even have a duty to consult with his client about appealing if the plea agreement included an appeal

waiver. *Id.* at 489 n.1 (Souter, J., concurring). Thus, the Court acknowledged that plea agreements with appeal waivers are not the same as other plea agreements and that evaluation of counsel's performance differs between them.

Notwithstanding this Court's caution, eight circuits have created another bright-line rule for cases involving appeal waivers. Ignoring the plain difference, these circuits have held that an attorney is per se ineffective for not filing an appeal when the client tells him to do so even though the client previously told counsel, the prosecutor, and the trial court that he did not want to file an appeal. As the Ninth Circuit said, "[t]his result is troubling." *Sandoval-Lopez*, 409 F.3d at 1197.

A. The Inclusion of an Appeal Waiver in a Plea Agreement Has Legal Significance.

1. A plea agreement constitutes a legally binding contract, and the parties bargain for provisions waiving appeal.

Plea agreements are considered contracts with constitutional dimensions, *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987) (Brennan, J., dissenting), to which the common law of contracts apply. *Puckett v. United States*, 556 U.S. 129, 137 (2009).[1] Nearly fifty years ago, this Court approved plea agreements as a method

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[1] *See also United States v. Norris*, 486 F.3d 1045, 1048–49 (8th Cir. 2007); *United States v. Novosel*, 481 F.3d 1288, 1293–94 (10th Cir. 2007); *United States v. Wood*, 378 F.3d 342, 348–50 (4th Cir. 2004); *United States v. Ready*, 82 F.3d 551, 558–59 (2d Cir. 1996); *Kingsley v. United States*, 968 F.2d 109, 115 (1st Cir. 1992).

of resolving criminal cases. *See Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970). Plea bargaining has become an essential component of the administration of justice. Properly administered, this Court has encouraged its use for many reasons. *Santobello v. New York*, 404 U.S. 257, 260–61 (1971). For a defendant who sees slight possibility of acquittal, limiting the probable penalty has clear advantages. *Brady*, 397 U.S. at 752. And the agreement provides finality, safety, and efficient use of judicial resources to the prosecution, public, and justice system. *Santobello*, 404 U.S. at 260–61.

The addition of an appeal waiver also has value. Research has revealed that "the government appears to provide some sentencing concessions more frequently to defendants who sign waivers than to [those] who do not." Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L. J. 209, 209–10, 232–42 (2005) (hereinafter "*Appeal Waivers*"). The research also shows that judges are more likely to accept sentencing stipulations and downward departures when an agreement includes a waiver. *Id.* at 235.

By simply entering a plea of guilty, the defendant waives many important constitutional rights. *Class v. United States*, 138 S. Ct. 798, 805 (2018). A guilty plea mostly waives trial rights, but the defendant also waives his right to assert claims inconsistent with his plea, such as asserting he did not commit the offense. *Id.* at 803–05.

2. A defendant exercises his right to "autonomy" when he chooses to waive his right to appeal in exchange for substantial benefits.

Because a state appeal right is not typically waived as part of the average plea deal, the right remains as an additional "bargaining chip."[2] And this Court has recently affirmed that it is "the defendant's prerogative, not his counsel's, to decide on the objectives of his defense," *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018), including the choice to end the litigation by accepting a plea offer. Though he has the "ultimate authority to make the fundamental decision whether to take an appeal," *Flores-Ortega*, 528 U.S. at 477, he exercises that authority when he chooses to use that additional bargaining chip to gain additional benefits. A defendant who wants these additional concessions must exercise his fundamental right to make the decision about his defense *at the plea agreement stage*.

Admittedly, as with all waivers of rights, an appellate waiver "not only must be voluntary but must be a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748.[3] As an added

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[2] *See Lout v. State*, 111 P.3d 199, 201 (Mont. 2005) (Lout's plea agreement was supported by consideration; Lout validly waived any right to appeal or challenge its terms.).

[3] *McDaniel v. State*, 38 N.E.3d 226 (Ind. Ct. App. 2015) (McDaniel knowingly and voluntarily waived his right to appeal his sentence and the trial court's mistaken advisement at the end of the sentencing hearing did not affect the validity of McDaniel's waiver.).

layer of protection, the trial court must determine that a defendant understands the terms of the agreement he is making and that he is entering into the agreement voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). But once this is done, the bargain—including the waiver of the right to file an appeal—is complete and enforceable and the defendant is bound by his agreement. *United States v. Evans*, 361 Fed. App'x 4, 6–7 (10th Cir. 2010) (citing *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (*en banc*)). Once a defendant negotiates away the right to appeal, the right is gone.

An attorney, to be effective, is required only to pursue and protect the *rights* of a client, not his *post hoc* regrets. Thus, where a defendant has forfeited his right to appeal, like here, counsel's performance is not per se deficient in not filing a notice of appeal, even where the client has post-plea regrets and wants to appeal his conviction or sentence. A properly informed defendant "cannot change his mind and later blame his lawyer." *United States v. Hirsch*, 207 F.3d 928, 931 (7th Cir. 2000); *see also United States v. Golden*, 255 Fed. App'x 319, 322 (10th Cir. 2007) ("[W]e cannot say that a lawyer engages in constitutionally deficient or prejudicial practice by declining to file an impermissible notice of appeal . . . . ").

This is particularly true in this case. Petitioner was informed over and over he would serve his three sentences consecutively, but he still exercised his prerogative to waive his right to appeal his sentence. After openly assuring the trial court he understood and accepted these conditions, he quickly turned around and tried to appeal his sentences anyway. When the request to appeal is this specific and the waiver so

explicit, an attorney's performance should not be considered unreasonable, deficient, or ineffective for not filing an appeal that his client was clearly not entitled to file. It is difficult, if not impossible, to find any "autonomy" principle that is violated in this scenario.

After consulting with his attorney,[4] Petitioner knowingly and intelligently bargained away his right to file an appeal of both his conviction and his sentence in exchange for charging and sentencing benefits so advantageous that the trial judge almost did not accept the plea. R. 132. So, unlike an ordinary plea agreement containing no appellate waiver, Petitioner's *right* to appeal his sentence no longer existed. Any arguable autonomy interest remaining is less compelling than the state's interest in maintaining finality for the

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[4] Petitioner has not contended his attorney failed to consult with him. This is probably because, under penalty of perjury, on two separate dates with nearly a month between them (January 22, 2015, and February 20, 2015), Petitioner indicated in at least six different ways that he had fully discussed the agreement he was entering into with his attorney and was satisfied with his attorney's counsel. His attorney also signed the forms acknowledging he had "discussed, in detail, the foregoing questions and answers with my client." R. 100, 112. Furthermore, in his plea agreements, which explicitly included waiver of his right to appeal and to question his sentence, App. 44a, 49a, he initialed paragraphs providing that he had "conferred with learned counsel" and that he was "pleased and satisfied with his legal representation." R. 91, 103. In the plea colloquies and sentencing hearing, the court asked Petitioner's counsel if he fully advised his client of his rights and of the consequences of pleading guilty to which counsel responded affirmatively. R. 124, 128 Furthermore, when asked by the Court, Petitioner admitted under oath that his attorney had told him to his satisfaction about his rights and potential defenses. R. 125,129.

benefit of the victim and the effective administration of justice.

Rather than "wrest" Petitioner's autonomy from him or "usurp" his authority, counsel respected his autonomy and assisted him in achieving his objective—a plea agreement that substantially reduced his sentence from life in prison to a little over ten years and that dismissed numerous charges, state and federal.

B. Neither Party Has a Right to Breach a Plea Agreement.

Petitioner makes the claim, however, that a defendant has an additional autonomy "right" to *breach* this enforceable agreement. Pet'r's Br. 8. No right to breach a plea agreement has ever been recognized and Petitioner cites no authority for such a novel idea. "The paucity of authority on the subject may be explained by the fact that such a notion has never been responsibly advanced." *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (referring to the lack of a right to use false evidence). In fact, just the opposite is true with many other constitutionally guaranteed rights that defendants waive.

1. In all other areas, defendants are held to their waivers.

Defendants can waive numerous constitutional rights, but an untimely or delayed attempt to revoke or withdraw that waiver is not allowed. For example, a defendant can waive his right to trial by jury, guaranteed by the Sixth Amendment, and choose to be tried by a judge instead. *Adams v. U.S. ex rel McCann*, 317 U.S. 269, 278–81 (1942). But he cannot withdraw

that waiver when it appears a bench trial might not be to his liking, nor can he withdraw it in an untimely manner, or in order to "game the system."[5] Similarly, a defendant should not be able to "game the system" by accepting the benefits of a plea bargain, agreeing to waive his right to an appeal, then withdrawing the waiver after sentencing—at least not in the absence of a motion to withdraw his *entire* plea agreement.

Defendants similarly cannot selectively waive their Fifth Amendment right to remain silent. *See Kansas v. Cheever*, 134 S. Ct. 596, 601 (2013); *Jenkins v. Anderson*, 447 U.S. 231, 236 n.3 (1980) ("[W]hen a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination."); *Brown v. United States*, 356 U.S. 148, 156 (1958). As the Court said in *Brown*, "[t]he interests of the other party and regard for the function of courts of justice . . . prevail in the balance of considerations." 356 U.S. at 156. A defendant should likewise not be able to selectively retain the benefits of a plea in which he has waived his right to an appeal, then be permitted to

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[5] *See, e.g.*, *Mojica v. State*, 437 S.E.2d 806, 807 (Ga. 1993) (explaining withdrawal must be made in such a fashion so as not to delay the trial or impede the cause of justice); *People v. Spencer*, 513 N.E.2d 514, 516 (Ga. 4th Dist. 1987) (A criminal defendant may not waive a jury, hoping to rely upon a nonexistent weakness in the charge and later retract that waiver.); *see also United States v. Satterwhite*, 893 F.3d 352, 358 (6th Cir. 2018); *United States v. Solorzano-Rivera*, 368 F.3d 1073, 1078 (9th Cir. 2004) ("Defendant would be able to 'game the system' by reacting favorably to a government's plea offer, waive indictment on lesser charges, and then after reneging on his part of the bargain, complain that the government failed to obtain an indictment within the appropriate time frame." (internal citations omitted)).

selectively breach a portion—the appeal waiver—*after* sentencing when he has buyer's remorse.

If a defendant wants to withdraw from his plea agreement altogether, state and federal law provide for those procedures.[6] But that is not what Petitioner asked his counsel to do. He instead told his counsel to ask an appeals court to reduce his sentence—and nothing else. No defendant is entitled to that relief. If a defendant chooses to breach a plea agreement (*e.g.*, by appealing a waived issue), the breach will cause him to lose the benefits of the bargain and put him back in his original position, ready to be tried and sentenced. He may be exposed to more charges, greater penalties, or both. *See, e.g., Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (defendant who breached agreement by refusing to testify against another person could be retried and sentenced to death).

Thus, defendants have no "right" to breach their agreements or revoke their waivers. No right is absolute; there are limitations on each one. In fact, self-representation, the original right at issue in the first

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[6] *See, e.g.*, 16A Ariz. R. Crim. Proc. 17.5, Ark. R. Crim. Proc. 26.1, Conn. Practice Book § 39-26, Conn. Practice Book 1998, § 39-27, Cal. Penal Code § 1192.5 (West), Ga. Code Ann. § 17-7-93, Ga. Uniform Sup. Court R. 33.12, Ind. C. 35-35-1-4, Kan. Stat. Ann. § 22-3210 (West); Ky. R. Crim. Proc. 8.10, La. Code Crim. Proc. art. 559, Md. R. 4-242; 49 Minn. S.A. R. Crim. Proc. 15.05, N.J. Ct. R. 3:21-1, 8 G. C. A. § 120.42, SDCL § 33-10-136, SDCL § 23A-27-11, Pa. C. C. R. Crim. P. No. 591, MI Rules MCR 6.310, N.J. R. 3:9-3(e), O.R.S. § 135.365, Nev. R. S. 176.165, Oh. Crim. R.32.1, 22 Ok. St. Ann. § 517, Pa. R. Crim. P. 591, Tenn. R. Crim. P. 32(f); Ut. C. A. 1953 § 77-13-6, Ut. R. Juv. P. 25A, U. C. A. 1953 § 39-6-38, Va. Code Ann. § 19.2-296, N.Y.C.P.L. § 220.60(3), Wisc. S.A. 971.08; Fed. R. Crim. P. 11(d) (withdrawal timing) & (e) (finality).

case to speak of "autonomy," *Faretta v. California*, 422 U.S. 806 (1975), has been restricted in numerous situations. *See Indiana v. Edwards*, 554 U.S. 164 (2008) (explaining states can insist on representation by counsel for those competent enough to stand trial but who suffer from severe mental illness); *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 154 (2000) (no right to self-representation on appeal); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (*pro se* defendant's Sixth Amendment right to conduct his own defense was not violated by unsolicited participation of standby counsel).

2. Prosecutors are not allowed to breach the terms of a plea agreement.

The obligation to abide by plea agreement terms is a two-way street. As this Court has recognized, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). Prosecutors are not only prohibited from explicitly repudiating the government's assurances, they may not engage in "end-runs around them." *United States v. Rivera-Rodriquez*, 489 F.3d 48, 57 (1st Cir. 2007). Adherence to the terms of a plea agreement requires more than "lip service" on a prosecutor's part. *Id.* A defendant is entitled not only to the government's 'technical compliance' with its stipulations but also to the 'benefit of the bargain' struck in the plea deal, and to the good faith of the prosecutor." *United States v. Matos-Quinones*, 456 F.3d

14, 24 (1st Cir. 2006) (quoting *United States v. Clark*, 55 F.3d 9, 11 (1st Cir. 1995)).

A defendant should no more be allowed to make an "end-run" around or "pay lip service to" his agreement than a prosecutor.

3. Defendant is not the only person harmed by his decision to breach a plea agreement.

Petitioner argues he has a "right" to decide whether to breach his plea agreement because he is the one who has to "tolerate the consequences." Pet'r's Br. 25–26. But he *isn't*. A plea agreement also benefits the criminal justice system and, often, the victim of the crime has to "tolerate the consequences." A breach of the appeal waiver could also upset a coextensive deal with other co-defendants. A prosecutor negotiating an appeal waiver is often motivated by the need to ensure the victim's safety, to avoid putting victims through the crucible of trial, to obtain restitution, in some tragic cases to *locate* a deceased victim, and to put an end to the litigation so that the victims or their families can move on with life.

Over the last twenty years, the victim's right to be involved in the criminal case has been recognized and protected by the citizens of nearly every state, as well as the federal government.[7] Victims' rights acts provide

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[7] *See, e.g.*, Crime Victim's Rights Act (CVRA), 18 U.S.C. § 3771. The citizens of thirty-four states have overwhelmingly approved constitutional protections for victims in their states. For details about the constitutional amendments in each of these states see the National Victims' Constitutional Amendment Passage, www.nvcap.org/states/stvras.html.

that victims have the right to consult with the prosecutor, to be represented by counsel, to be reasonably heard at plea and sentencing hearings, to receive restitution, and to be informed of any plea bargain. A victim may even move the court to re-open a plea or sentence if either her right to be heard was denied or if the accused did not plead to the highest offense charged. This Court has also recognized that these statutes give victims a stake in a criminal proceeding. *See, e.g.*, *Paroline v. United States*, 572 U.S. 434, 439 (2014); *Dolan v. United States*, 560 U.S. 605, 607-08 (2010); *Hughey v. United States*, 495 U.S. 411, 421 (1990); Md. Code Crim. Proc. § 11-103 (West) (victim right to appeal); *see also State v. Barrett*, 255 P.3d 472, 481–82 (Or. 2011) (sentence vacated because victim denied right to be heard at sentencing); *State v. Casey*, 44 P.3d 756, 765–66 (Ut. 2002) (court acted properly by "informally" reopening plea agreement acceptance hearing to permit crime victim's opposition to plea).

Petitioner's argument that, "like any party to a contract," he alone has the right to decide whether he is willing to breach an appeal waiver because he alone "bears the personal consequences" of that decision is quite false. Pet'r's Br. 25–26. Whether the victim has been involved in the negotiation of the plea or not, the state, the victim(s), society as a whole, and the entire plea-bargaining process is harmed by a rule that permits the defendant to breach that promise or direct his counsel to do it for him.

C. It Is Not Unreasonable or Deficient Performance for an Attorney to Refuse to File an Appeal on an Issue Clearly Covered by the Plea Agreement.

Petitioner focuses on a broad right to appeal numerous issues other than the issue he asked counsel to appeal—his consecutive sentences. There are, of course, several issues outside the scope of an appeal waiver that could be the subject of an appeal. But Petitioner did not ask his counsel to appeal any of those issues.

This Court in *Flores-Ortega* held that "[i]f counsel has consulted with the defendant[,] . . . counsel performs in a professionally unreasonable manner only by failing to follow the defendant's *express instructions* with respect to an appeal." 528 U.S. at 478 (emphasis added). Counsel consulted with his client numerous times both before and after sentencing. Petitioner's express instruction to counsel initially was to enter the plea. Counsel helped Petitioner do so. Petitioner never expressly asked counsel to undo that action by seeking to withdraw from the plea agreement altogether.

Where a defendant has entered into a plea agreement without an appeal waiver, filing an appeal afterward would cause no harm and conceivably might do some good. By contrast, where a defendant has waived his right to appeal, appealing an issue plainly within the scope of the appeal waiver could do no good yet could cause harm by voiding the whole agreement. *See Nunez v. United States*, 546 F.3d 450, 455 (7th Cir. 2008). Breaching the agreement by filing an appeal would risk the state reinstating the full charges against Petitioner. He would have been exposed to a

potential life sentence for possession of methamphetamine with the intent to distribute, another life sentence under the persistent violator sentencing enhancement, charges of burglary and grand theft, increased charges for felony assault, battery, and carrying a concealed weapon, and he could have been turned over to the federal prosecutor for prosecution of illegal possession of ammunition. R. 41a, 42a, 47a, 48a. Under such circumstances, "a defendant has more reason to protest if his lawyer files an appeal that jeopardizes the benefit of the bargain than to protest if the lawyer does nothing—for 'nothing' is at least harmless." *Nunez*, 546 F.3d at 455.

Common sense tells us that it is more "professionally reasonable" to refrain from filing a waived appeal that would breach the plea agreement causing serious and long-term consequences for a client than filing an appeal to which the client is not entitled due to his waiver and that he has no possible chance of winning.

III. PREJUDICE SHOULD NOT BE PRESUMED.

In *Flores-Ortega*, this Court said that to apply a "presumption of prejudice," there must be the "denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right." *Flores-Ortega*, 528 U.S. at 483. As explained above, however, defendants who enter appeal waivers do not have "a right" to appeal issues within the scope of those waivers. Nor, contrary to Petitioner's contention, is it "unfair" to require a defendant to prove on a case-by-case basis that he was prejudiced by counsel's failure to file an appeal in this context. Pet'r's Br. 29–33.

A. If a Defendant Has No Right to a Proceeding, Counsel's Actions Cannot "Lose the Proceeding" If He Fails to File a Notice of Appeal.

As this Court has recognized, "[t]he right of appeal, as we presently know it in criminal cases, is purely a creature of [state] statute." *Martinez*, 528 U.S. at 159–60 (citing *Abney v. United States*, 431 U.S. 651, 656, n.3 (1977)).[8] States therefore have the constitutional flexibility to permit waiver of the right,[9] to establish procedural ground rules for appeal (which

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[8] The Court has repeatedly stated that there is no due process requirement that the states or the federal government provide a right of appeal. *See, e.g.*, *McKane v. Durston*, 153 U.S. 684, 687 (1894); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[T]here is of course no constitutional right to appeal . . . ."); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.").

[9] *See, e.g.*, Md. Code Ann., Cts. & Jud. Proc. § 12-302 (Except where a conditional plea of guilty is entered, § 12-301 does not permit an appeal from a final judgment entered following a plea of guilty in a circuit court); Kan. Stat. Ann. § 22-3602 (No appeal can be taken from a judgment upon a plea of guilty, except on jurisdictional or other grounds going to the legality of the proceedings.); La. Code Crim. Proc. Art. 881.2A(2) (defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement); Tenn. R. App. Proc. 3 (Appeal of right lies on a plea of guilty if the defendant entered into a plea agreement but explicitly reserved the right to appeal certain issues, or if defendant seeks review of sentence and there was no plea agreement, or if the issues presented for review were not waived); *Hooks v. State*, 668 S.E.2d 718 (2008) (explaining that a defendant may waive his right to appeal); *Jones v. Commonwealth*, 795 S.E.2d 705, 714 (2017) (noting Virginia has long held that a criminal defendant can waive his right to appeal).

may be more than a "ministerial task"), and to provide for alternatives to such proceedings.[10]

Throughout this country, at both the state and federal level, courts routinely dismiss appellate petitions on the ground that the defendant waived his right to appeal and thus has no right to be heard.[11] Where a state such as Idaho allows for a waiver to remove the right to an appellate proceeding, a defendant does not "*lose*" the proceeding if an appeal is not filed.

B. It Is Not "Profoundly" Unfair to Require a Defendant to Make an Individualized Showing that His Appeal Would Have Had Merit.

Petitioner agreed not to file an appeal. Where the defendant has autonomously waived his right to appeal in exchange for negotiated benefits, it is not *always* prejudicial and "profoundly unfair" to require him to make an individualized showing why he need not abide by that agreement.

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[10] *See, e.g.*, Cal. Penal Code § 1237.5 (West) (written statement, under oath, showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceeding); Md. Rule 8-204 ("The application shall contain a concise statement of the reasons why the judgment should be reversed or modified and shall specify the errors allegedly committed by the lower court.").

[11] *See, e.g. Lee v. State*, 69 N.E.3d 955 (Ind. Ct. App. 2016) (defendant waived right to challenge sentence); *People v. Castillo*, 208 A.D.2d 944, 945, 618 N.Y.S.2d 78, 79 (1994); *Vance v. State*, 2009 WL 1450412, at *1 (Tex. Cr. App. May 26, 2009); *Cook v. State*, 14-06-00515-CR, 2006 WL 2075048, at *1 (Tex. App. July 27, 2006).

What *is* fair is that he *abides by his promise*. The state, the court, and the victims of the crime relied on that promise. Under such circumstances, nothing is "profoundly unfair" about requiring him to show that the few remaining issues he would raise in the appeal would have *some* merit. Requiring a basic individualized showing that the appeal has some merit is consistent with this Court's ineffective assistance of counsel jurisprudence. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 748 (1991), *as modified by Martinez v. Ryan*, 566 U.S. 1 (2012).

It is, however, "profoundly unfair" to deny the State and the victim the finality they bargained for when agreeing to the plea agreement. "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring), an interest shared by the State and the victims of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *See generally Payne v. Tennessee*, 501 U.S. 808 (1991). "Finality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson*, 523 U.S. 538, 555 (1998).

C. States Provide Defendants Adequate Avenues to Assert Claims that Fall Outside the Scope of Appeal Waivers.

More often than not, the only issues that a state will allow to survive after an appeal waiver are the interrelated issues of voluntariness of the plea and ineffective assistance of counsel. Petitioner's brief focuses on those claims, even though he did not ask his counsel to pursue them. He then asserts that it is unfair to require defendants to pursue them through state post-conviction proceedings rather than on direct appeal. Pet'r's Br. 29. Of course, that issue is not before the Court because his counsel did not decline his request to appeal on the grounds that he did not enter the plea voluntarily or that his counsel was ineffective during the course of entering the plea. Petitioner's argument also fails on its own terms. It is not unfair for states to channel those two claims to post-conviction review.

Both issues are highly factual, will not be reflected in the record, and are, usually, within the personal knowledge of only three people: the defendant, his counsel, and the prosecutor. They are therefore better reviewed in post-conviction proceedings rather than on appeal. This Court has determined that for issues where the record does not reflect the necessary facts to support the arguments, proceedings other than appeal are more effective. *See Massaro v. United States*, 538 U.S. 500, 508 (2003). Specifically, the Court found that appeals are not the best forum for assessing ineffective-assistance-of-counsel claims even if the record contained some indication of deficiencies in counsel's performance. *Id.* at 504. Thus, it allowed ineffective

assistance claims to be raised in the first instance in the trial court, which it found best suited to develop the necessary facts. *Id.* at 505. The Court also noted a growing majority of state courts, approximately thirty, were allowing such claims to be raised for the first time in post-conviction proceedings. *Id.* at 508 (citing *Commonwealth v. Grant*, 813 A.2d 726, 735 (Pa. 2002) (cataloging other states' case law)).

The remaining issues can be reviewed through other trial court motions, such as a motion to reconsider or modify sentence, motion to withdraw plea, motion for out of time appeal, motion in arrest of judgment, motions to dismiss, and motion for new trial.[12] These trial court motions are often used to raise breach, illegal sentence, and lack of jurisdiction. Thus, within state-specific parameters, defendants have other options, some of them even more effective than an appeal, to vindicate a valid claim.

In this case, for example, Petitioner could have filed a motion to reconsider or modify his sentence in the trial court. I.C.R. 35. He had 120 days to do that and no time limitation if the sentence were illegal. If he had wanted to contest the voluntariness of his plea, he

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[12] *See, e.g.*, Ga. Code Ann. § 17-9-60 (motion in arrest of judgment); Kan. Stat. Ann. § 22-3504 correct sentence); Kan. Stat. Ann. § 22-3502 (arrest of judgment); La. Code Crim. Proc. art. 851 (new trial); La. Code Crim. P. art. 859 (arrest of judgment); Md. Rule 4-332 (writ of actual innocence); Md. Code Ann., Crim. Proc. § 8-401 (failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error *coram nobis*); Tenn. R. Crim. P. 35 (reduction of sentence); Tenn. R. Crim. P. 34 (arrest of judgment); Md. Rule 4-345 (sentencing; revisory power of court); Va. Code § Ann. 19.2-296 (motion to withdraw plea).

could have filed a motion to withdraw the plea. Petitioner therefore had the ability to attempt to withdraw his plea if he was not happy with the bargain he made. *See McKinney v. State*, 396 P.3d 1168, 1177–80 (Id. 2017); *State v. Green*, 943 P.2d 929, 931–32 (Id. 1997). He did not attempt to do so because he wanted to have his cake and eat it too. In the absence of an attempt to withdraw his entire plea, he should be bound by it. He should not be allowed to effectuate untimely partial withdrawal by ordering counsel to violate the agreement.

IV. APPEAL WAIVERS BENEFIT MULTIPLE PARTIES, AND SO A RULE DIMINISHING THEIR VALUE WOULD NEGATIVELY AFFECT THE CRIMINAL JUSTICE SYSTEM.

A defendant's ability to bargain away his right to appeal has been approved by all federal circuits and incorporated into the law of all of the states.[13] At least at the federal level, appeal waivers are an additional bargained-for provision in two-thirds of the cases

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[13] *See, e.g., In re Sealed Case*, 283 F.3d 349, 355 (D.C. Cir. 2002); *United States v. Teeter*, 257 F.3d 14, 21–26 (1st Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001); *United States v. Hernandez*, 134 F.3d 1435, 1437 (10th Cir. 1998); *United States v. Ashe*, 47 F.3d 770, 775–76 (6th Cir. 1995); *United States v. Schmidt*, 47 F.3d 188, 192 (7th Cir. 1995); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993); *United States v. Salcido-Contreras*, 990 F.2d 51, 51 (2d Cir. 1993); *United States v. Melancon*, 972 F.2d 566, 567–68 (5th Cir. 1992); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992), *overruled on other grounds by United States v. Andis*, 333 F.3d 886 (8th Cir. 2003); *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990); *United States v. Navarro-Botello*, 912 F.2d 318, 322 (9th Cir. 1990).

settled by plea agreements. *See Appeal Waivers*, 55 Duke L. J. at 212.

Such waivers, which guarantee finality in the proceedings for the State, the defendant, the victim, and the system, have great value to all involved. The principle of finality is "essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). Additionally, "it provides peace of mind to a wrongdoer's victims; it promotes public confidence in the justice system; it conserves limited public resources; and it ensures the clarity of legal rights and statuses." *Buck v. Davis,* 137 S. Ct. 759, 785 (2017) (Thomas, J., dissenting). And, as mentioned above, defendants benefit from the additional concessions offered by the prosecutor and an improved chance of approval by the court.

If prosecutors cannot obtain the finality that appeal waivers provide, they will far less often seek to include them in plea agreements. That makes it less likely victims and judges will agree to plea agreements. And if prosecutors cannot guarantee the reduction in workload or other specific benefits that such waivers bring, they are more likely to go to trial or hold out for stiffer sentences, both of which will burden defendants, the judicial system, and the prison system.

CONCLUSION

For the foregoing reasons, and those described by Respondent, this Court should affirm the Idaho Supreme Court.

Respectfully submitted,

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